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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

LEVITT AND SONS, INCORPORATED,

Appellant,

v.

DIVISION AGAINST DISCRIMINATION IN THE STATE DEPARTMENT OF EDUCATION, WILLIE R. JAMES and FRANKLIN D. TODD,

Respondents.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

JURISDICTIONAL STATEMENT.

WILLIAM P. REISS,
PITNEY, HARDIN & WARD,
500 Broad Street,
Newark 2, New Jersey,
Attorneys for Appellant.

CLYDE A. SZUCH,
On the Brief.

April 15, 1960.

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ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

JURISDICTIONAL STATEMENT.

Appellant appeals from the judgment of the Supreme Court of New Jersey entered on February 9, 1960, rehearing denied April 8, 1960, in which the Supreme Court of New Jersey affirmed the judgment of the New Jersey Superior Court, Appellate Division, entered July 22, 1959. The Supreme Court of New Jersey is the highest state court available to appellant. New Jersey Constitution, Article VI, Section II, Paragraph 2.

Opinions Below.

The opinion of the Supreme Court of New Jersey, dated February 9, 1960, is reported at 31 N. J. 514, 158 A. 2d 177. (A copy of the opinion and judgment of the New Jersey

Supreme Court is attached hereto as Appendix A.) The opinion of the New Jersey Superior Court, Appellate Division, is reported at 56 N. J. Super. 542, 153 A. 2d 700. (A copy of the Appellate Division opinion is attached hereto as Appendix B.)

Jurisdiction.

On December 11, 1958, appellant, a builder of one-family homes, instituted this action in the New Jersey Superior Court, Law Division, challenging the applicability to it and the constitutionality under both the state and federal constitutions of the New Jersey Law Against Discrimination (N. J. S. A. 18:25-1, *et seq.*), establishing a civil right to obtain, *inter alia*, a "publicly assisted housing accommodation" without discrimination because of race, creed, color, national origin or ancestry. The Superior Court, Law Division, dismissed the action on procedural grounds. On appellant's appeal, the Superior Court, Appellate Division, considered the case on the merits and held, by opinion and judgment filed July 22, 1959, that the statute applied to appellant's houses and that it was constitutionally valid under both the New Jersey and United States Constitutions. That Court denied a rehearing by order entered September 24, 1959.

On appellant's further appeal, the New Jersey Supreme Court, by opinion and judgment filed on February 9, 1960, affirmed the judgment of the Superior Court, Appellate Division, both as to the applicability of the statute to appellant's housing and its constitutional validity under the New Jersey and United States Constitutions.

On February 15, 1960, appellant filed in the Supreme Court of New Jersey its Notice of Appeal to this Court and an amendment to the Notice of Appeal.

The New Jersey Supreme Court, on April 8, 1960, granted appellant's motion for leave to file a petition for rehearing out of time and denied the petition for rehearing on the same day. On April 11, 1960, appellant filed in the New Jersey Supreme Court an Amendment to its Notice of Appeal to reflect this action of the Court.

The jurisdiction of the Supreme Court to review the judgment of the Supreme Court of New Jersey is conferred by 28 U. S. C. §1257 (2), 62 Stat. 929.

The following decisions sustain the jurisdiction of this Court to review the judgment of the Supreme Court of New Jersey on appeal in this case: *Winters* v. *New York,* 333 U. S. 507, 509 (1948); *Charleston Federal Savings & Loan Assoc.* v. *Alderson,* 324 U. S. 182, 185 (1945); *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282 (1921).

Should it be considered that this appeal was improvidently taken, this Court nevertheless has jurisdiction to review the judgment of the Supreme Court of New Jersey by writ of certiorari pursuant to 28 U. S. C. §1257(3), 62 Stat. 929; 28 U. S. C. §2103, 62 Stat. 962. The following recent decision sustains the jurisdiction of this Court for such review: *Pennsylvania* v. *Philadelphia,* 353 U. S. 230 (1957).

Statutes and Constitutional Provisions Involved.

The provisions of the New Jersey Law Against Discrimination (N. J. S. A. 18:25-1 *et seq.*), the validity of which are drawn in question are:

N. J. S. A. 18:25-4

"All persons shall have the opportunity to obtain employment, to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation and publicly assisted housing accommo-

dation, without discrimination because of race, creed, color, national origin or ancestry, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right." N. J. L. 1945, c. 169, p. 589, §4, as amended N. J. L. 1949, c. 11, p. 38, §2; N. J. L. 1957, c. 66, p. 128, §1.

N. J. S. A. 18:25-5

. . . . . .

"k. 'A publicly assisted housing accommodation' shall include all housing built with public funds or public assistance pursuant to chapter 300 of the laws of 1949, chapter 213 of the laws of 1941, chapter 169 of the laws of 1944, chapter 303 of the laws of 1949, chapter 19 of the laws of 1938, chapter 20 of the laws of 1938, chapter 52 of the laws of 1946, and chapter 184 of the laws of 1949, and all housing financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the Federal Government or any agency thereof." N. J. L. 1945, c. 169, p. 589, §5, as amended N. J. L. 1949, c. 11, p. 38, §3; N. J. L. 1951, c. 64, p. 419, §3; N. J. L. 1957, c. 66, p. 128, §2.

N. J. S. A. 18:25-9.1

"The Division Against Discrimination in the State Department of Education shall enforce the laws of this State against discrimination in housing built with public funds or public assistance, pursuant to any law, because of race, religious principles, color, national origin or ancestry. The said laws shall be so enforced in the manner prescribed in the act to which this act is a supplement." N. J. L. 1954, c. 198, p. 745, §1.

The provisions of the United States Constitution herein involved are Article VI, Clause 2 and the Fourteenth Amendment.

Questions Presented.

1. Is the New Jersey Law Against Discrimination, as applied to appellant because its purchasers finance their acquisition costs under the FHA mortgage insurance program, unconstitutional in violation of Article VI, Clause 2 of the United States Constitution in that it places local restrictions upon a national program adopted by Congress in the exercise of its constitutional powers, conflicts with congressional policy and imposes requirements upon a federal agency subject to federal constitutional standards?

2. Is the New Jersey Law Against Discrimination, as construed by the New Jersey Supreme Court, so vague and indefinite as to violate the due process clause of the Fourteenth Amendment because of the absence of any standards by which the identity of the persons subject to the provisions of said statute can be determined?

Statement of Facts.

Appellant Levitt and Sons, Incorporated (hereinafter referred to as "Levitt") is a private New York business corporation authorized to do business in New Jersey. Levitt is engaged in the business of developing large tracts of land and erecting thereon one-family residential houses over a period of years.

This action involves Levitt's development of a large tract of land in Levittown Township, Burlington County, New Jersey, on which Levitt proposes to erect and sell, over a period of 5 to 6 years, approximately 16,000 one-family houses of which approximately 3,000 have already been built and sold.

Levitt is not a governmental instrumentality. In connection with its New Jersey development, it has not received any governmental assistance by way of eminent domain powers or tax exemption. It has not obtained any monies from either the state or federal governments. All of Levitt's financing for acquisition and construction costs has been obtained from non-governmental sources. Neither the state nor the federal government, or any agencies thereof, has guaranteed or insured the repayment of such loans of money.

In planning its development and constructing its houses, Levitt complied with regulations and procedures of the Federal Housing Administration (FHA) thus enabling prospective purchasers to finance the cost to them of acquiring houses with FHA insured mortgage loans obtained from private lending institutions. Such FHA insured mortgage loans are provided for by the National Housing Act of 1934, as amended. 12 U. S. C. §1701 *et seq.*

FHA has not adopted rules or regulations establishing a nation wide policy requiring absence of discrimination in the sale of housing purchased with the assistance of an FHA insured loan. As pointed out at page 463 in the Report of the United States Commission On Civil Rights, 1959, during the first 16 years of its life "FHA itself actually encouraged the use of racially restrictive covenants". Subsequent to this Court's decisions in *Shelley* v. *Kraemer*, 334 U. S. 1 (1948) and *Hurd* v. *Hodge*, 334 U. S. 24 (1948), FHA changed this policy nationally. In certain states, FHA has also adopted a policy of refusing to insure loans made to purchasers who buy from builders who discriminate because of race. Report of the United States Commission On Civil Rights, 1959, at page 465. Those states are ones in which anti-discrimination legislation dealing with housing has been adopted.

For example, the official FHA printed forms used in New Jersey, *e.g.* FHA Form No. 2004—Federal Housing Administration Mortgagee's Application For Commitment and FHA Form No. 2201-G—Federal Housing Administration Application For Conditional Commitment bear a rider referring to the New Jersey Law Against Discrimination and continuing as follows:

> "As with other provisions of State and local laws, you are expected to conduct your operations in conformity with the above laws. Any instance, where the Commissioner finds that a valid determination has been made of your non-compliance with any provision of these laws, may result in no further extension of FHA business with you pending the satisfactory correction of the non-compliance."

History of Litigation

The individual respondents filed complaints and amended complaints in the Division Against Discrimination of the New Jersey State Department of Education (hereinafter referred to as the "Division") in the summer of 1958 alleging that Levitt's houses were publicly assisted housing accommodations within the meaning of the New Jersey Law Against Discrimination, particularly the sections of the statute above set forth, and that Levitt had violated such statutes in refusing to sell houses to respondents because of their race, they being members of the Negro race.

Subsequent to receipt of notice of hearings thereon in the Division pursuant to N. J. S. A. 18:25-13 to 17, inclusive, Levitt, on December 11, 1958, commenced an action in lieu of prerogative writ in the Superior Court, Law Division. N. J. Revised Rules 4:88-1 *et seq.* Levitt challenged the jurisdiction of the Division to entertain the complaints of the individual respondents and to proceed to the hearing thereon

on the grounds that, as a matter of construction, the New Jersey Law Against Discrimination did not confer jurisdiction upon the Division to enforce the statutory provisions against Levitt and that the statutory prohibitions were not applicable to Levitt's housing. Levitt also alleged, in Paragraph 12 of its complaint, that if the New Jersey Law Against Discrimination was construed to apply to its housing and to bring it within the jurisdiction of the Division, such legislation was unconstitutional in that

> ". . . it violates Article I, section 10 and the Fourteenth Amendment of the United States Constitution . . . being a deprivation of property without due process of law, a denial of the equal protection of the laws and an interference with the liberty of contract; it also constitutes an unlawful interference by the State with the powers granted to the Federal Government by Article I, section 8(1) of the United States Constitution."

The Superior Court, Law Division, granted *ad interim* relief staying the administrative proceedings and, after answer and upon respondents' motions to dismiss for lack of jurisdiction, it dismissed Levitt's action on the grounds that the action should have been brought in the Superior Court, Appellate Division, and that the action was premature in that Levitt had failed to exhaust administrative remedies. An order dismissing the action and dissolving the *ad interim* restraint was entered on February 24, 1959.

Levitt appealed to the Superior Court, Appellate Division. On March 10, 1959, the Court entered an order staying the administrative proceedings and accepting the appeal on the merits. In its opinion filed July 22, 1959, the Appellate Division summarized the federal constitutional arguments of Levitt. (Appendix B, pp. 31a to 32a.) After holding that the New Jersey Law Against Discrimination was applicable

to Levitt's housing and conferred jurisdiction on the Division with respect to discrimination in the sale thereof, the Court rejected Levitt's contentions as to unconstitutionality of the statute. (Appendix B, p. 33a.) Levitt's petition for rehearing in that court urging that the Appellate Division's construction of the statute rendered it unconstitutional in violation of Article VI, Clause 2 of the United States Constitution and the Fourteenth Amendment was denied by order entered on September 24, 1959.

Levitt's Notice of Appeal to the Supreme Court of New Jersey was filed on the same day. In its brief and oral argument in the Supreme Court of New Jersey, Levitt maintained its position that the New Jersey Law Against Discrimination did not apply to its housing and that the law did not confer jurisdiction on the Division. These contentions were rejected by the Supreme Court of New Jersey in its opinion filed on February 9, 1960. (Appendix A, pp. 7a to 15a.) That Court also rejected Levitt's contention that the New Jersey Law Against Discrimination was invalid under both the New Jersey and the United States Constitutions.

In Point VI of its opinion (Appendix A, pp. 19a-20a), the Court rejected Levitt's argument that the statute unconstitutionally invaded a legislative field pre-empted by Congress. In making this argument, Levitt had pointed out that Congress, in adopting the National Housing Act in the exercise of its constitutional powers under Article I, Section 8 of the United States Constitution, had expressly rejected proposed amendments thereto which would have specifically prohibited discrimination in the sale of housing which was to be financed with the assistance of an FHA insured loan. In Point VII of its opinion (Appendix A, pp. 20a to 21a), the Supreme Court held that the statute was

not invalid under the supremacy clause, Article VI, Clause 2 of the United States Constitution, resting its holding on its discussion in connection with the argument involving pre-emption.

In Point V of its opinion (Appendix A, p. 19a), the Court dismissed Levitt's argument that the statute established an unreasonable and arbitrary classification in violation of the Fourteenth Amendment in that the definition in N. J. S. A. 18:25-5(k) of "publicly assisted housing accommodation", as used in N. J. S. A. 18:25-4, failed to include in the ban of the statute certain categories of state assisted housing, though asserted to include Levitt's housing. The Court's rejection of Levitt's contention in this regard was rested upon its holding that the statutory phrase "publicly assisted housing accommodation" used in N. J. S. A. 18:25-4 was not limited in meaning to the definition set forth in N. J. S. A. 18:25-5(k) (Appendix A, p. 12a), thus making the statute applicable to those categories of state assisted housing even though not specifically listed in the definition.

Because of the construction thus put on the statute by the Supreme Court of New Jersey, Levitt cannot urge this constitutional argument in this Court. However, the elimination of the statutory definition of "publicly assisted housing accommodation" in N. J. S. A. 18:25-5(k) renders the subject matter of the prohibition of the statute so vague and indefinite as to constitute the deprivation of Levitt's property without due process of law in violation of the Fourteenth Amendment. Levitt could not reasonably have anticipated this construction of the New Jersey Law Against Discrimination and, accordingly, was not in a position to urge this federal constitutional infirmity prior to the rendition of the opinion of the New Jersey Supreme Court. On March 28, 1960, Levitt moved for leave to

file a petition for rehearing out of time, in which petition accompanying the motion it urged the Supreme Court of New Jersey to reconsider its holding on the ground that the construction of the statute adopted by it rendered the term "publicly assisted housing accommodation" so vague and indefinite as to violate the due process clause of the Fourteenth Amendment. By order entered April 8, 1960 the Court granted Levitt's motion and denied the petition for rehearing.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

Introduction.

The New Jersey Law Against Discrimination, as construed by the New Jersey Supreme Court, prohibits discrimination in the sale of one-family houses by private corporate builders where the builder complies with FHA statutory and regulatory procedures so that its prospective purchasers may finance their acquisition costs with an FHA insured mortgage loan from a private lending institution. Levitt is such a private corporate builder which the New Jersey Supreme Court has held to be subject to the state statute and state administrative agency enforcement procedures.

It is Levitt's position that a state cannot constitutionally legislate prohibitions against discrimination regulating the operation of such a federal program adopted by Congress in the exercise of its general welfare power under Article I, Section 8 of the United States Constitution. Even if the states have such constitutional power, the New Jersey Law Against Discrimination is not a constitutionally valid exercise of such power.

I.

The New Jersey Law Against Discrimination is unconstitutional in violation of Article VI, Clause 2 of the United States Constitution.

In the exercise of its constitutional power to provide for the general welfare (U. S. Const. Art. I, §8), Congress enacted the National Housing Act of 1934. 12 U. S. C. §1701 *et seq.*

The FHA residential mortgage loan insurance program is national in scope and has grown to gigantic financial proportions. During its history, FHA has helped nearly 5 million families to own homes. On May 28, 1958, the total outstanding mortgage insurance and commitments was nearing the statutory limit of approximately 25.7 billion dollars. As a result, Senate Joint Resolution 171 was approved on June 4, 1958 (72 Stat. 176) increasing the authorized limit by 4 billion dollars, thus enabling the agency to resume its regular operations. A further indication of the scope of the FHA operation can be seen by its activities in 1958. In that year, FHA insured 26% of the total non-farm dwelling units started and 3.2 billion dollars of increased mortgage debt for that year was FHA insured. Twelfth Annual Report, Housing and Home Finance Agency, Part iii: Federal Housing Administration (1958), pp. 45-6, 60.

In authorizing this FHA program, Congress established certain basic requirements. However, Congress did not, either when the FHA program was first authorized, or since that time, impose the obligation on the builders and sellers to make their houses available to all persons on a non-discriminatory basis. In fact, "the defeat of non-discrimination provisions was considered by a substantial segment

of the legislature to be a *sine qua non* for the passage of the housing statutes." Comment, 59 COLUM. L. REV. 782, 784 at n. 19 (1959).

Furthermore, Congress has repeatedly refused to adopt a policy of prohibiting discrimination despite pressures by the National Association for the Advancement of Colored People and by individual Congressmen to amend the National Housing Act to include a requirement that all FHA insured homes be sold on a non-discriminatory basis.

The NAACP requested such an amendment to the Housing Act of 1953[1], to the Housing Act of 1954[2], and to the Housing Act of 1956[3]. Similar amendments were offered on the floor of the House of Representatives in 1954 by Representative Adam Clayton Powell and Representative (now Senator) Jacob Javits of New York, both of which were rejected. Congressional Record, 83rd Congress, 2nd Sess., vol. 100, part 4, pp. 4487-4491. Congressman Powell introduced the same amendment on the floor in 1955 with the same result. Congressional Record, 84th Congress, 1st Sess., vol. 101, part 9, p. 12,136.

In light of the magnitude of the FHA program, the consequent need for a uniform, national policy in a matter so basic as civil rights, Congressional failure to adopt anti-discrimination provisions in enacting the various FHA laws indicates a Congressional policy not to have such limitations imposed. *Dorsey* v. *Stuyvesant Town Corp.*, 299 N. Y. 512, 87 N. E. 2d 541 (1949), *cert. denied*, 339 U. S.

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[1] Hearings on S.1621, S.1848, S.1864 & S.2103 Before the Senate Committee on Banking and Currency, 83rd Cong., 1st Sess. at p. 264 (1953).

[2] Hearings on S.2889, S.2938 & S.2949 Before the Senate Committee on Banking and Currency, 83rd Cong., 2nd Sess. at pp. 893, 897 (1954).

[3] Hearings on H. R. 10157 Before the House Committee on Banking and Currency, 84th Cong., 2nd Sess. at p. 523 (1956).

981 (1950); compare *American Bridge Co.* v. *Smith*, 352 Mo. 616, 179 S. W. 2d 12, 157 A. L. R. 798, 803 (1944), *cert. denied*, 323 U. S. 712 (1944), with *Western Union Tel. Co.* v. *Lenroot*, 323 U. S. 490, 499-501 (1945). In *Dorsey*, the New York Court of Appeals said:

> "The Legislature deliberately and intentionally refrained from imposing any restriction upon a redevelopment company in its choice of tenants. The law contains none. Attempts, repeatedly made in the Legislature since the law was enacted, to alter the policy of the statute in this respect have failed. . . . [Pointing out that in another housing statute the Legislature expressly prohibited discrimination, the Court went on to say:] There is no claim that the Legislature refused by amendment to make similar provision in the Redevelopment Companies Law because it thought the statute already barred discrimination, and it is undisputed, therefore, that the legislative intent is clear to leave private enterprise free to select tenants of its own choice." 87 N. E. 2d at 547.

Despite contrary Congressional policy, New Jersey seeks to impose upon FHA a standard of non-discrimination. That such a result is not permitted is demonstrated by one of this Court's earliest decisions. In *M'Culloch* v. *Maryland*, 17 U. S. (4 Wheat.) 316 (1819), Marshall, C. J., held that the governmental functions and operations of the federal government are immune from state control under Art. VI, Clause 2 of the United States Constitution, stating:

> ". . . the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. . . ." 17 U. S. at 436.

This principle has been consistently followed by this Court. In *Johnson* v. *Maryland*, 254 U. S. 51 (1920), it was held that a state could not impose its requirements for a driver's license on a postal employee. In *Mayo* v. *United States*, 319 U. S. 441 (1943), the Court invalidated a state statute requiring an inspection fee to be paid on every bag of fertilizer sold or distributed to the extent that it was applicable to a federal program of fertilizer distribution. More recent recognition of this principle of constitutional law may be found in *Miller* v. *Arkansas*, 352 U. S. 187 (1956), and *Public Utilities Commission* v. *United States*, 355 U. S. 534 (1958).

In *Miller*, this Court held invalid a state licensing statute imposing on contractors performing work for the federal government requirements different from those required by the federal government. Subjecting the federal contractor to such licensing requirements, said the Court, "would give the State's licensing board a virtual power of review over the federal determination of 'responsibility' and would thus frustrate the expressed federal policy. . . ." 352 U. S. at 190. In reaching this conclusion, the Court held that the rationale of *Johnson* v. *Maryland*, *supra*, was applicable wherein it was said, *inter alia:*

> "[the state licensing] requirement does not merely touch the government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders, and requires qualifications *in addition* to those that the government has pronounced sufficient. . . ." 254 U. S. at 57. (Emphasis added.)

In *Public Utilities*, this Court held invalid a state statute which gave a state commission the power to determine whether reduced rates charged by a carrier to the United

States were "just and reasonable." Such a statute, said the Court, "places a prohibition on the Federal Government . . . [and creates a] conflict between the federal policy of negotiated rates and the state policy of regulation of negotiated rates. . . ." 355 U. S. at 544. The statute was held to violate the supremacy clause of the United States Constitution, Art. VI, Clause 2.

Applying these principles to this case it is apparent that the New Jersey Law Against Discrimination is invalid because, despite contrary Congressional policy, the statute has the effect of prohibiting FHA from insuring mortgage loans in New Jersey on housing unless sold in compliance with the New Jersey statute. This case is thus indistinguishable from the *Miller* and *Public Utilities* cases where the states were held powerless to regulate federal agencies by imposing standards in addition to or different from those required by federal law. *Accord, Penagaricano* v. *Allen Corp.*, 267 F. 2d 550 (1st Cir. 1959).

This frustration of Congressional policy and regulation of a federal agency cannot be justified on the ground that the New Jersey Law Against Discrimination is actually an aid to a program established by Congress. Where, as here, the state statute conflicts with the Congressional policy, the state statute is superseded whether or not it purports to supplement the federal law. As stated by Mr. Justice Holmes in *Charleston & W. C. R. Co.* v. *Varnville Furniture Co.*, 237 U. S. 597, 604 (1915):

> "When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go. . . ."

The New Jersey Law Against Discrimination is also invalid under the supremacy clause because of its conflict

with the due process clause of the Fifth Amendment of the United States Constitution.

It is fundamental that the federal government is enjoined by the Fifth Amendment from pursuing a racially discriminatory policy in its operations. *Bolling* v. *Sharpe*, 347 U. S. 497 (1954). As an agency of the federal government, FHA is subject to the Fifth Amendment.

FHA provides substantial and important assistance to the building industry. The New Jersey Supreme Court pointed out that FHA's insured mortgage loan program and other government insured purchase money housing loans created the mass market for housing without which Levitt's development would not have been built. It held that Levitt was publicly (federally) assisted because of the advantages accruing to it as a developer under the FHA program, stating that the existence of Levitt's houses "is primarily attributable to public assistance." That court also stated that it considered FHA's assistance to Levitt as a builder to be on a par with the assistance furnished to home owners and buyers obtaining FHA insured mortgage loans. (Appendix A, pp. 12a-13a.) *Accord, Ming* v. *Horgan*, 3 Race Rel. Rep. 693 (Super. Ct. Calif. 1958) (not officially reported); *contra, Johnson* v. *Levitt & Sons, Inc.*, 131 F. Supp. 114 (E. D. Pa. 1955).

The Fifth Amendment obligates FHA, in providing federal assistance to private builders, to impose a duty not to discriminate on a national basis. *Accord, Shelley* v. *Kraemer*, 334 U. S. 1 (1948) (private discrimination imputed to government because of judicial assistance); cf., *American Communications Ass'n* v. *Douds*, 339 U. S. 382, 401 (1950); *Steele* v. *Louisville & Nashville R. R. Co.*, 323 U. S. 192, 208-209 (1944); *Ming* v. *Horgan, supra;* see also, *Kerr* v. *Enoch Pratt Free Library*, 149 F. 2d 212 (4th Cir. 1945), *cert. denied*, 326 U. S. 721 (1945).

The New Jersey Law Against Discrimination imposes a standard of conduct upon FHA when that agency is already subject to the Fifth Amendment of the United States Constitution. This dual regulation cannot be permitted in light of the fact that the comprehensive federal constitutional standard is supreme. U. S. Const. Art. VI, Clause 2.

II.

The New Jersey Law Against Discrimination, as construed and applied to Levitt by the Supreme Court of New Jersey, is so vague and indefinite as to violate the due process clause of the Fourteenth Amendment.

The New Jersey Supreme Court has held that Levitt's housing development is a "publicly assisted housing accommodation" as to which all persons have a civil right to obtain all the accommodations, advantages, facilities and privileges thereof without discrimination, as provided in N. J. S. A. 18:25-4. In so holding that Court, in effect, eliminated the statutory definition in N. J. S. A. 18:25-5(k) of "a publicly assisted housing accommodation".

It is to be noted that the definition in N. J. S. A. 18:25-5(k) does not purport to include, as does the New York Executive Law, Article 15, §292, subdivision 11(e) (Appendix C, pp. 43a-44a), and other similar state legislation, housing offered for sale as to which a federal agency commitment that the acquisition may be financed by a loan the repayment of which the federal agency will insure. Recognition of the fact that the definition in N. J. S. A. 18:25-5(k) did not include Levitt's housing impelled the New Jersey Supreme Court to hold that it was nevertheless "publicly assisted housing accommodation" within the meaning of that phrase as used in N. J. S. A. 18:25-4, and

that such phrase is not limited in meaning to the definition in N. J. S. A. 18:25-5(k) which merely supplied illustrations. (Appendix A, pp. 9a and 12a.)

Where the phrase has been used, legislatures have precisely defined the meaning and scope of the phrase. CAL. HEALTH AND SAFETY CODE §35710, as supplemented by CAL. LAWS 1959, ch. 1681; MASS. GEN. LAWS, ch. 151 B, §1, as supplemented by MASS. LAWS 1957, ch. 426, §1; N. Y. CIVIL RIGHTS LAW, Art. 2-A, §18-b, as supplemented by N. Y. LAWS 1950, ch. 287, and amended by N. Y. LAWS 1955, ch. 341; N. Y. EXEC. LAW, Art. 15, §292, as supplemented by N. Y. LAWS 1955, ch. 340, and amended by N. Y. LAWS 1956, ch. 563; REV. CODE WASH. §49.60.040, as amended by WASH. LAWS 1957, ch. 37, §3; see also, CONN. GEN. STATS. Sec. 53-35, as amended by PUB. ACTS 1959, ch. 113. (Appendix C.)

The New Jersey Supreme Court's construction eliminated the statutory standards by which the Division is to determine, in the first instance, whether it has jurisdiction over particular housing as a "publicly assisted housing accommodation".

The phrase "publicly assisted housing accommodation" is not one of common or general usage. It has been legislatively manufactured mainly for the purpose of anti-discrimination legislation with respect to housing.

Definitions of "publicly assisted housing accommodation", such as those in the foregoing statutes and N. J. S. A. 18:25-5(k), are essential to give meaning to this new combination of old words. Otherwise the meaning cannot reasonably be ascertained by the most conscientious of tribunals and, *a fortiori*, by either the persons intended to be benefited by the statute or those who must consider whether they are subject to the statute.

Public assistance to owners or builders of housing accommodations can include not only tax exemption of

land, use of eminent domain powers, below-cost sale by government, grants or loans of money, and government insurance or guarantees of purchase mortgage loans but also an immensely wide variety of governmental contacts with builders and home owners. These contacts include adoption or amendment of zoning and planning ordinances, planning board approval and recommendations concerning a proposed subdivision, building inspector approval and recommendations concerning plans and specifications, zoning variances, municipal provision for parks, playgrounds, schools, off-street parking facilities, shade tree planting, police and fire protection and a host of other governmentally furnished services and facilities. There is no available source from which it can be ascertained what housing is comprehended by the statutorily undefined phrase "publicly assisted housing accommodation" and no basis for concluding that the statutory phrase includes Levitt's housing except judicial fiat.

It is well settled that a statute violates due process of law when it either requires or forbids the performance of an act in terms so vague that it is impossible to determine the governing standard. This doctrine is not limited to penal statutes, but is equally applicable to civil statutes. *A. B. Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233 (1925); *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 463 (1927).

The application of the foregoing due process requirements with respect to statutes involving administrative agencies has in recent years been especially frequent in the areas of pupil assignment laws and laws governing speech censorship.

In *Orleans Parish School Board* v. *Bush*, 242 F. 2d 156 (5th Cir. 1957), *cert. denied*, 354 U. S. 921 (1957), the court was concerned with the constitutionality of the Lou-

isiana Pupil Assignment Law. This law provided for the assignment of each pupil each year by the parish superintendent to a particular school, and a method of appellate review, without providing any standards other than those found in a companion law providing for segregation of races. This statute was struck down on alternative grounds—total absence of standards or an implied unconstitutional standard of race. In reaching this conclusion, the court said:

> "... The plaintiffs, seeking to assert their right to attend non-segregated schools as guaranteed them under the Constitution, would be remitted to an administrative official guided by no defined standards in the exercise of his discretion. In such circumstances no number of hearings or appeals would avail them anything because it would be impossible for them to bring forward any proof bearing on whether they possessed those attributes, qualifications, or characteristics that would bring them within the group of students permitted to attend the particular school or schools. Attempts by statute to give any official the power to assign students to schools arbitrarily according to whim or caprice are legally impermissible, especially if considered in light of the history of assignments made in a manner that has now been held to be unconstitutional and of the recently readopted requirement of the state constitution reaffirming such unconstitutional standards, which is reinforced by the heavy sanctions against any official permitting a departure therefrom contained in a companion statute. Such a statute is unconstitutional either because it has on its face the effect of depriving appellees of their liberty or property without due process of law or as having implied as its only basis for assignments the prohibited standard of race. ..." 242 F. 2d at 164-5.

To the same effect is *Board of Supervisors of La. St. U. & A. & M. Col.* v. *Ludley*, 252 F. 2d 372 (5th Cir. 1958), *cert. denied*, 358 U. S. 819 (1958), wherein a subsequent Louisiana law relating to attendance in public schools was held unconstitutional on the same alternative grounds—lack of objective standards or a prohibited race standard.

One of the landmark cases dealing with free speech censorship is *Burstyn* v. *Wilson*, 343 U. S. 495 (1952). That case involved the validity of a New York statute relating to the licensing of motion pictures. The statute provided that a license would not be granted to a motion picture found to be "sacrilegious" by the licensing board. This statute was held to be unconstitutional because the governing standard "sacrilegious" did not provide a sufficiently definite guide to the censor. 343 U. S. at 505-506. Particularly illuminating and pertinent is Justice Frankfurter's concurring opinion, wherein he states:

> "To paraphrase Doctor Johnson, if nothing may be shown but what licensors may have previously approved, power, the yea or nay saying by officials, becomes the standard of the permissible. Prohibition through words that fail to convey what is permitted and what is prohibited for want of appropriate objective standards, offends Due Process in two ways. First, it does not sufficiently apprise those bent on obedience of law of what may reasonably be foreseen to be found illicit by the law-enforcing authority, whether court or jury or administrative agency. Secondly, where licensing is rested, in the first instance, in an administrative agency, the available judicial review is in effect rendered inoperative. On the basis of such a portmanteau word as 'sacrilegious,' the judiciary has no standards with which to judge the validity of administrative action which necessarily involves, at least in large measure, subjective determinations. Thus, the administrative first step becomes the last step." 343 U. S. at 532.

Applying the foregoing principles to the instant case, we submit that N. J. S. A. 18:25-4 is unconstitutional. The New Jersey Supreme Court has eliminated all standards by which it could have been determined whether one's housing was a "publicly assisted housing accommodation" and thus subject to the Law Against Discrimination. Builders of housing in New Jersey are subject to the whim, caprice and arbitrary action of the Division when it decides that particular housing is a "publicly assisted housing accommodation".

A further result of the absence of standards is that there is no basis on which a builder can challenge the Division's determination nor any basis on which a court can determine whether the Division's assertion of jurisdiction and attempted enforcement of the Law Against Discrimination is proper and justified. The administrative action is the first and last step in this regard.

Such inadequacy of standards derived from a vague and indefinite statutory characterization of persons or subject matter to be subjected to administrative agency jurisdiction is violative of the due process clause of the Fourteenth Amendment of the United States Constitution. N. J. S. A. 18:25-4, as construed by the New Jersey Supreme Court, lacks the definiteness required by federal constitutional law to enable the Division or the courts or alleged violators of the Law Against Discrimination to determine the applicability of the law in particular instances. The legislation as construed by the New Jersey Supreme Court is totally devoid of guidance in this fundamental respect.

III.

Because of the nation-wide significance of this case and the substantiality of the constitutional questions herein involved, this Court should take jurisdiction of this case on appeal.

The nation-wide scope of the FHA program under the National Housing Act of 1934, as amended, (12 U. S. C. §1701 *et seq.*) has had a tremendous impact on the housing industry.

The Act had as its original objective the stimulation of the building industry and the alleviation of unemployment. *United States* v. *Emory*, 314 U. S. 423, 430 (1941). FHA's statistical record amply demonstrates the success of FHA in achieving this objective.

FHA has written mortgage insurance on more than 5 million homes and on multi-family rental and cooperative rental housing projects that house more than 800,000 families. Report of the United States Commission on Civil Rights, 1959, p. 462.

In the calendar year of 1958, FHA received applications for mortgage insurance on approximately 900,000 homes, almost twice the number received in 1957. In the same year FHA insured mortgage loans totalling in excess of 6.3 billion dollars, which assisted the financing of 382,000 homes, 65,000 multi-family project dwelling units and over a million property improvement loans. Twelfth Annual Report, Housing and Home Finance Agency, Part iii: Federal Housing Administration (1958), pp. 45-6, 57.

National uniformity with respect to prohibitions against discrimination by FHA assisted builders of homes and multi-family projects is non-existent. Rather, such restrictions on builders are dependent solely on the vagaries of

state legislative action. As previously pointed out, such legislation exists in New Jersey, California, Connecticut, Massachusetts, New York and Washington. Similar legislation also exists in Colorado (COLO. LAWS 1959, ch. 148) and Oregon (ORE. REV. STATS. §659.010). There is no comparable state legislation in the other 42 states of the United States.

The constitutional questions raised are of national importance and particularly as they also affect the 8 states which have apparently sought to impose local restrictions on a national congressional program undertaken in the exercise of the general welfare power. Prompt resolution of these constitutional questions is necessary because, with the nation-wide scope of FHA and its increasing dollar and numerical volume of activity, there is need to determine now the existence and extent of FHA's constitutional obligations.

This case comes to this Court as a case of first impression. The questions presented have not been decided by the highest court of any state except the state of New Jersey. Lower court decisions are in conflict. Compare *O'Meara* v. *Washington State Board Against Discrimination* (not officially reported) Super. Ct. Wash. 1959 (Appendix D) with *New York State Commission Against Discrimination* v. *Pelham Hall Apartments*, 10 Misc. 2d 334, 170 N. Y. S. 2d 750 (N. Y. Sup. Ct. 1958); and compare *Johnson* v. *Levitt & Sons, Inc.*, 131 F. Supp. 114 (E. D. Pa. 1955) with *Ming* v. *Horgan*, 3 Race Rel. Rep. 693 (not officially reported) (Super. Ct. Calif. 1958).

Most of the state legislation prohibiting discrimination with respect to housing has been adopted within the last few years. It is important that the states with existing legislation and enforcement procedures, as well as those considering the advisability of following in their path, be advised of the constitutional limits on their power to legislate

restrictions on the operation of the FHA program in their states. FHA, when freed of heterogeneous state legislative restrictions, can then pursue, as it should, a nationally uniform approach to the problem of discrimination.

Conclusion.

The questions presented by this appeal are substantial and of public importance. The case is one of first impression. It is respectfully submitted that probable jurisdiction should be noted.

WILLIAM P. REISS,
PITNEY, HARDIN & WARD,
500 Broad Street,
Newark 2, New Jersey

Attorneys for Appellant,
Levitt and Sons, Incorporated.

CLYDE A. SZUCH,
On the Brief.

April 15, 1960.

Appendix A.

OPINION OF SUPREME COURT OF NEW JERSEY.

SUPREME COURT OF NEW JERSEY.

Nos. A63 and A64, September Term 1959

LEVITT AND SONS, INCORPORATED, a New York Corporation,
Plaintiff-Appellant,

v.

DIVISION AGAINST DISCRIMINATION IN THE STATE DEPARTMENT OF EDUCATION, WILLIE R. JAMES and FRANKLIN D. TODD,
Defendants-Respondents,

and

GREEN FIELDS FARM, INC., a New Jersey Corporation,
Plaintiff-Appellant,

v.

DIVISION AGAINST DISCRIMINATION IN THE STATE DEPARTMENT OF EDUCATION and YUTHER GARDNER,
Defendants-Respondents.

Argued December 22, 1959. Decided February 9, 1960.

On appeal from Superior Court, Appellate Division, whose opinion is reported in 56 N. J. Super. 542.

The opinion of the court was delivered by

BURLING, J. The plaintiff Levitt and Sons, Incorporated, a New York corporation authorized to do business in New Jersey (hereinafter referred to as Levitt) is the developer of a single home housing project called Levittown, located in Levittown Township, Burlington County, New Jersey.

Opinion of Supreme Court of New Jersey.

The plaintiff Green Fields, Inc., a New Jersey corporation (hereinafter referred to as Green Fields) is the developer of a similar project called Green Fields Village, located in West Deptford Township, Gloucester County, New Jersey. Defendants Todd and James allegedly were rejected by Levitt as purchasers of houses in Levittown because of their color; both are Negroes. Defendant Gardner, also a Negro, allegedly was rejected by Green Fields as a purchaser of a house in Green Field Village because of his color. All three, Todd, James and Gardner, filed individual complaints with the New Jersey Division Against Discrimination (hereinafter referred to as DAD) charging the plaintiffs with refusals to sell to the individual defendants in violation of the New Jersey Law Against Discrimination, *N. J. S. A.* 18:25-1 *et seq.*, and seeking an order of the DAD requiring the plaintiffs to cease and desist their discrimination against the complainants. Findings of probable cause for the complaints were made by the DAD pursuant to *N. J. S. A.* 18:25-14, and attempts at conciliation pursuant to the same statute were unsuccessful. Each of the individual defendants then filed amended complaints, Todd and James naming William J. Levitt, an officer of Levitt, as an additional respondent to their complaints, and Gardner naming Robert A. Budd and Horace B. Peters, officers of Green Fields, as additional respondents to his complaint. The complaints were set down for hearings (Gardner's complaint was to be heard separately from Todd's and James') but postponed to a later date.

Before they could be held, however, Levitt and Green Fields instituted independent suits in lieu of prerogative writs in the Superior Court, Law Division, challenging the jurisdiction of the DAD to hear the discrimination complaints and attacking the constitutionality of the New Jersey Law Against Discrimination. The suits were consolidated for hearing and on defendants' motion were dismissed by

the trial court on the grounds that an appeal from any action of the DAD must be taken to the Superior Court, Appellate Division, as provided in *R. R.* 4:88-8(*b*) and that in any event plaintiffs had failed to exhaust their administrative remedies, *R. R.* 4:88-14. Plaintiffs appealed to the Superior Court, Appellate Division. That court agreed to hear the matter as if leave had been requested and granted to appeal from the DAD's setting down of the discrimination complaints for hearing and then decided the cause on its merits. 56 *N. J. Super.* 542 (*App. Div.* 1959). It held the Law Against Discrimination, *N. J. S. A.* 18:25-1 *et seq.*, to be constitutional and affirmed the jurisdiction of the DAD to consider the discrimination complaints. It dismissed, however, those complaints insofar as they related to the individual respondents, William J. Levitt, Robert A. Budd and Horace B. Peters, holding that as to these persons the discrimination complaints were not filed within the time required by the statute, from which determination no appeal has been taken. Levitt and Green Fields appealed to this court from that part of the Superior Court, Appellate Division's decision applicable to them. The appeal is made to this court as a matter of right because of the substantial constitutional questions involved. *R. R.* 1:2-1 (*a*). Since the filing of the actions in lieu of prerogative writs, the hearings in the DAD on the discrimination complaints have been stayed by successive orders, first by the trial court, then by the Superior Court, Appellate Division. Before the arguments in this court, however, we granted the DAD's motion to permit the hearings in the DAD to continue.

Levitt's single home housing project, Levittown, in which approximately 2,000 houses have been built to the present time, will contain 16,000 houses when completed, according to original plans. Green Fields' project, Green Fields Village, comprises approximately 550 houses, all of which have been sold. Originally 700 units were to have been constructed in Green Fields Village, but all houses constructed

to date have been sold, and apparently no new construction has begun. Both projects have been planned and constructed in order that they might qualify for purchase money loans insured by the Federal Housing Administration (FHA), a process which requires attention to the desired end from the very earliest beginnings of the development.

Before construction has begun, a housing project developer who seeks to have FHA insured loans available to purchasers of his houses must contact an FHA office in the region in which the project will be located to obtain FHA approval of the site selected for the project. Once a site approval is given, the developer will submit detailed subdivision information to the FHA office, on a form prepared by the FHA, together with certain exhibits, such as a topographic map, photographs, detailed development plan and like items; frequently these are amended or completely revised to accord with suggestions made by the FHA. When the subdivision information and exhibits are satisfactory to the FHA, that agency issues a subdivision report, giving FHA requirements concerning street layouts, curb and sidewalk specifications, utilities, drainage, open spaces, lot improvements and similar matters. House plans are submitted to determine if they meet FHA requirements; the FHA architectural section will often recommend changes in these plans. Upon receiving the subdivision report, the developer arranges with an FHA-approved lending institution to submit individual applications for commitments for FHA insurance on any loan which might be made by the institutions. These individual applications are reviewed by the architectural, valuation and mortgage credit sections in addition to the Chief Underwriter's office, after which commitments are issued to the approved lending institution covering the individual properties contemplated in the application. These commitments take various forms. One is a conditional commitment, an agreement between the FHA

and the approved lending institution that, subject to the conditions stated in the commitment and subject to the approved lending institution's submitting a proposed purchaser whose qualifications are satisfactory to the FHA, a loan made to finance the purchase of the property in question will be insured. Another form of commitment is an "Operative-Builder Firm Commitment," which differs from a conditional commitment primarily in that the former also contemplates loans being made directly to the developer, prior to sale, if requested.

Once the commitment is issued, the developer may commence construction. As construction progresses, the developer or the approved lending institution through which the FHA commitment was made arranges for an FHA inspection. Normally three such inspections are made during the course of construction. In some larger developments, such as Levittown, an FHA inspector is stationed at the project. Often the inspector or other FHA personnel will meet with the developer to discuss problems that have arisen during construction affecting compliance with FHA requirements. As the houses are sold by the developer to purchasers interested in obtaining an FHA insured mortgage loan, an application for approval of the purchaser is submitted to the FHA by the approved lending institution to whom the conditional commitment was made. If the qualifications of the purchaser are satisfactory to the FHA, an individual firm commitment is issued to the approved lending institution in the name of the purchaser. After title is closed, the approved lending institution submits the mortgage bond to the FHA along with copies of the bond, the mortgage and the original commitment. When these are approved, the FHA endorses the bond for insurance, which comprises the contract between the FHA and the lender.

Having received conditional commitments, the developer advertises the availability of FHA financing to purchasers.

By using FHA insured loans, a purchaser needs only a 3% downpayment on a principal sum of up to $13,500, 15% on the difference between $13,500 and $16,000, and 30% on the difference between $16,000 and $20,000. The term of the loan may be as long as 30 years. Conventional financing often involves downpayments of 20% to 25% and frequently will be limited to terms of 20 to 25 years. Thus it is apparent that FHA financing is a large factor in stimulating home buying, since the low downpayment opens the home market to persons who have accumulated only small savings and the extended term of the loan allows home ownership to be achieved by payments from income by a much larger proportion than would ordinarily be the case. Concerning the importance of FHA approval to the large housing project developer, Robert A. Budd, president of Green Fields, stated on his deposition that such approval "is the basics (sic) on which to go on." William Levitt, president of Levitt, stated before the House Subcommittee on Housing of the Committee on Banking and Currency of the Eighty-Fifth Congress that "We are 100 percent dependent on Government. Whether this is right or wrong it is a fact." Only a very small percentage of the buyers of homes in Levittown and Green Fields Village financed their purchase other than with federally insured loans.

I.

Since the questions involved in this appeal relate to the jurisdiction of the administrative agency and the constitutionality of the statute on which the administrative action in question is based, it is apparent that plaintiffs should not be made to exhaust their administrative remedies before pursuing the present action. *Fischer* v. *Bedminster Tp.*, 5 *N. J.* 534, 542 (1950); *Ward* v. *Keenan*, 3 *N. J.* 298, 302-309 (1949). The questions are purely legal, an area where the administrative expertise would be of no real value. Under

such circumstances, we have consistently held that exhaustion of remedies will not be required. *Honigfeld* v. *Byrnes*, 14 *N. J.* 600, 604 (1954); *Nolan* v. *Fitzpatrick*, 9 *N. J.* 477, 487 (1952). And the applicable rule, *R. R.* 4:88-14, has been so interpreted. *Honigfeld* v. *Byrnes, supra.* We may proceed, therefore, to the merits of the appeal.

II.

First to be determined is whether the DAD has jurisdiction under the Law Against Discrimination, *N. J. S. A.* 18:25-1 *et seq.*, to entertain the complaints brought by the individual defendants against the plaintiffs. There are two questions here. The first is whether the plaintiffs' developments are "publicly assisted housing accommodation" as that phrase is used in section 4 of the Law Against Discrimination and amplified by section 5(*k*) of that statute. The second is, if plaintiffs' developments are within the classification, whether the statute gives the DAD jurisdiction to hear or act on complaints claiming discrimination with respect thereto.

A.

Does "publicly assisted housing accommodation" as used in section 4 of the Law Against Discrimination, *N. J. S. A.* 18:25-4, apply to plaintiffs' projects? Plaintiffs point to *N. J. S. A.* 18:25-5(*k*), which states:

> "k. 'A publicly assisted housing accommodation' shall include all housing built with public funds or public assistance pursuant to chapter 300 of the laws of 1949, chapter 213 of the laws of 1941, chapter 169 of the laws of 1944, chapter 303 of the laws of 1949, chapter 19 of the laws of 1938, chapter 20 of the laws of 1938, chapter 52 of the laws of 1946, and chapter 184 of the laws of 1949, and all housing financed in

whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the Federal Government or any agency thereof."

In approaching the construction of the statute it is necessary to be mindful of the clear and positive policy of our State against discrimination as embodied in *N. J. Const., Art.* I, *par.* 5. Effectuation of that mandate calls for liberal interpretation of any legislative enactment designed to implement it.

Plaintiffs argue that, since any other portion of this statute is not applicable, their projects are publicly assisted housing accommodations only if they are "housing financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the Federal Government or any agency thereof." And even this portion of section 5(*k*) is not applicable, plaintiffs contend, inasmuch as their projects were financed on an entirely private basis until title passed from the developer to the purchaser, at which point there could be no discrimination by the developer since the house was no longer within his control. Stated with greater particularity, the argument is that the Law Against Discrimination, insofar as it relates to housing, imposes the principle of nondiscrimination in selecting a purchaser only on the condition that the housing is "*financed* • • • by [federally insured] *loans* • • •." (Emphasis supplied) If the housing is not so financed, the owner may act discriminately in selecting a purchaser. This implies, plaintiffs contend, that the federally insured loan must be in existence with respect to the housing at the time the discrimination occurs if it is to be said that the discrimination violates *N. J. S. A.* 18:25-1 *et seq.* If there exists at the time of discrimination only an FHA commitment to insure a loan made with respect to the

house, plaintiffs argue that this is not enough. The statute, they urge, applies only if these [sic] exists at the time of discrimination a federally insured loan made with respect to the housing in question. Thus, pointing to their own situation plaintiffs conclude that since the discrimination could occur only as to the houses still owned by plaintiffs, and since at the time none of these houses were financed by a federally insured loan, the discrimination charged against plaintiffs could not have violated the Law Against Discrimination, *N. J. S. A.* 18:25-1 *et seq.* While plaintiffs admit that the houses they built most likely, when sold, *would be* financed by a federally insured loan, and the FHA commitments were obtained in *contemplation* of such financing, they argue that the statute does not speak in terms of future possibilities, but only of existing conditions. To support this conclusion, plaintiffs contend that if the Legislature had intended the Law Against Discrimination to apply to housing as to which FHA commitments to insure had been issued, it could easily have done so. They point to the New York Law Against Discrimination, which served as a pattern for the New Jersey statute. It has a provision absent in the New Jersey statute relating to housing as to which FHA commitments have been issued, N. Y. Executive Law, §292, *subd.* 11(*e*), the implication being that by omitting this provision, our Legislature intended to remove such housing from the coverage of this State's act. Furthermore, plaintiffs would draw the same conclusion from the Legislature's failure subsequently to adopt bills which would have expressly included the FHA commitment situation within the New Jersey Law Against Discrimation.

Under the view we take of the statute in question, however, it is unnecessary to decide whether section 5(*k*) of the statute as it now reads applies to houses as to which FHA commitments to insure loans have been issued. It may be noted, however, that there is much persuasive force in the

argument that in the context of this type of case a liberal interpretation of the word "financed" is justified and required, and under such interpretation plaintiffs' housing should be considered "financed" by a loan secured by a mortgage, the repayment of which is insured by the federal government. But even admitting for the sake of argument the validity of plaintiffs' contention described above, we believe that *N. J. S. A.* 18:25-4 applies to the developments in question.

Section 4 of the Law Against Discrimination, *N. J. S. A.* 18:25-4, states:

> "All persons shall have the opportunity to obtain employment, to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation and publicly assisted housing accommodation, without discrimination because of race, creed, color, national origin or ancestry, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right."

The plaintiffs would confine the meaning of "publicly assisted housing accommodation" to those examples enumerated in *N. J. S. A.* 18:25-5(*k*). We disagree. Rather, we believe the type of housing listed in section 5(*k*) to be only illustrations of the meaning of the phrase being considered, rather than an exhaustive enumeration. The reason for this conclusion lies in the Legislature's use of the words "shall include." In *State* v. *Rosecliff Realty Co.*, 1 *N. J. Super.* 94 (*App. Div.* 1948), certification denied 1 *N. J.* 602 (1949), the court was considering an alleged violation of the civil rights statute, *R. S.* 10:1-1 *et seq.* Involved was whether a swimming pool was a "place of public accommodation, resort, or amusement" as that phrase is used in the civil rights statute. The latter phrase was defined in *R. S.*

10:1-5 which stated that the term "shall be deemed to include" many specific places, none of which was a swimming pool. The court stated:

> "The court below was of the opinion 'that the legislature went to great length in setting forth and defining "place of public accommodation, resort or amusement." ' This view is incorrect. The language of section 5 is 'a place of public accommodation, resort or amusement within the meaning of this chapter shall be deemed to include' certain enumerated places. If it was the intent to narrow the broad scope of the phrase 'any places of public accommodation, resort or amusement,' as used in section 2, inept language was used for that purpose. The verb 'include' has not been defined so as to give to it such a restrictive meaning." *State* v. *Rosecliff Realty Co., supra*, 1 *N. J. Super.*, at *page* 101.

In *American Surety Co. of New York* v. *Marotta*, 287 *U. S.* 513, 517, 53 *S. Ct.* 260, 77 *L. Ed.* 466 (1933), the Supreme Court held that the term "creditors," as used in the Federal Bankruptcy Act, has a broader meaning than the specific examples of the term given in the definitions section of that statute, which examples were headed by a phrase indicating that, for the purposes of the Bankruptcy Act, the word "creditor" shall include certain persons. To the same effect concerning the meaning of "include," see *Central R. Co. of New Jersey* v. *Director, Division of Tax Appeals*, 8 *N. J.* 15, 28 (1951); *United States* v. *Gertz*, 249 *F.* 2*d* 662 (9 *Cir.* 1957); *People* v. *Western Air Lines*, 42 *Cal.* 2*d* 621, 268 *P.* 2*d* 723 (*Sup. Ct.* 1954); *Red Hook Cold Storage Co.* v. *Department of Labor*, 295 *N. Y.* 1; 64 *N. E.* 2*d* 265, 163 *A. L. R.* 439 (*Ct. App.* 1945).

Two further observations are pertinent. First, the Legislature, by certain portions of the definitions section

of the Law Against Discrimination, *N. J. S. A.* 18:25-5, evinced its ability to give a term an exclusive definition by stating that the term shall "mean" certain things. *N. J. S. A.* 18:25-5(*g*), (*h*), and (*j*). Second, the Legislature's failure to state expressly that housing covered by FHA commitments was within the Law Against Discrimination, either by copying that portion of the New York statute relating to such commitments or by adopting amendments to the Law Against Discrimination intended to achieve the same result, can be attributed to the general phrase "publicly assisted housing accommodation" being considered as sufficient by itself to include such housing within the purview of the statute. *Cf. Key Agency* v. *Continental Cas. Co.*, 31 *N. J.* 98, 105 (1959).

Thus we hold that "publicly assisted housing accommodation," as used in *N. J. S. A.* 18:25-4, is not limited in meaning to the instances set out in *N. J. S. A.* 18:25-5(*k*), although those examples are illustrations of the general situations in which *N. J. S. A.* 18:25-4, insofar as it pertains to housing, is applicable. And it is not difficult to perceive that the developments in question fall into the class of housing described by the portion of *N. J. S. A.* 18:25-4 under consideration.

The statute plainly includes, as publicly assisted housing, housing projects such as those here involved as to which, at the time of the discrimination, an FHA insured loan is committed. *N. J. S. A.* 18:25-5(*k*). And the public assistance demonstrated by the federal insurance of such loans is much the same, under the circumstances of this case, as that demonstrated by an FHA commitment to insure housing loans. Just as ownership of housing and its concomitant benefits attributable to an FHA insured loan is said by the statute to be publicly assisted, by the same reasoning the advantages which accrue to the developers in question from the FHA commitments are plainly the result

of public assistance. The very existence of the development can be attributed to the FHA commitment. The mass market opened by FHA and other government insured purchase money housing loans accounts for the prospect of sufficient buyers to purchase the housing in question. Without such a mass market, it is inconceivable that the developments would have been built; the number of prospective purchasers with adequate savings accumulated to make the down payment required by conventional financing and with sufficient income to meet from their income the payments on a conventionally financed debt would not warrant the mass housing construction in evidence today. Thus the very fact that there are houses with which to discriminate in the development in question is primarily attributable to public assistance. We need not here decide what are the outer limits of the term "publicly assisted housing accommodation." Suffice it to say that the public assistance rendered the housing here in question places it within the definition of that term as used in *N. J. S. A.* 18:25-4, and perhaps within *N. J. S. A.* 18:25-5(*k*).

B.

The plaintiffs next argue that, even should their developments be construed to be publicly assisted housing, the DAD is without jurisdiction to hear the charges brought by the individual defendants inasmuch as the Legislature, while it established as a civil right access to publicly assisted housing, failed to give the DAD power over discrimination in any type of housing save that described in the first portion of *N. J. S. A.* 18:25-5(*k*). This argument runs as follows: The first New Jersey statutes forbidding discrimination in respect to housing were passed in 1950. *L.* 1950, *c.* 105 to *c.* 112, *N. J. S. A.* 55:14*A*-7.5, 39.1, 55:14*B*-5.1, 55:14*C*-7.1, 55:14*D*-6.1, 55:14*E*-7.1, 55:14*H*-9.1, 55:16-8.1. These related to housing built pursuant to *L.* 1949, *c.* 300,

N. J. S. A. 55:14*A*-31 *et seq.*; *L.* 1941, *c.* 213, *N. J. S. A.* 55:14*C*-1 *et seq.*; *L.* 1944, *c.* 169, *N. J. S. A.* 55:14*D*-1 *et seq.*; *L.* 1949, *c.* 303, *N. J. S. A.* 55:14*H*-1 *et seq.*; *L.* 1938, *c.* 19, *N. J. S. A.* 55:14*A*-1 *et seq.*; *L.* 1938, *c.* 20, *N. J. S. A.* 55:14*B*-1 *et seq.*; *L.* 1946, *c.* 52, *N. J. S. A.* 55:14*E*-1 *et seq.*; and *L.* 1949, *c.* 184, *N. J. S. A.* 55:16-1 *et seq.* There existed uncertainty as to the mode of enforcement of the statutes passed in 1950, and as a consequence *N. J. S. A.* 18:25-9.1 was enacted. See the preamble to *L.* 1954, *c.* 198, and the Statement of Purpose accompanying *Senate Bill* 78 (1954). When *L.* 1957, *c.* 66 was adopted, amending *N. J. S. A.* 18:25-4 to pertain to publicly assisted housing accommodations and adopting *N. J. S. A.* 18:25-5(*k*), *N. J. S. A.* 18:25-9.1 was left unchanged. Thus plaintiffs argue that the DAD has jurisdiction to act only on charges of discrimination in connection with housing referred to in the acts to which *L.* 1950, *c.* 105 to *c.* 112 were amendments. We think, however, that to adopt this argument would be to construe the statute in question too strictly. *N. J. S. A.* 18:25-9.1 states:

> "The Division Against Discrimination in the State Department of Education shall enforce the laws of this State against discrimination in housing built with public funds or public assistance, *pursuant to any law*, because of race, religious principles, color, national origin or ancestry. The said laws shall be so enforced in the manner prescribed in the act to which this act is a supplement." *L.* 1954, *c.* 198, § 1. (Emphasis supplied)

The phrase "pursuant to any law" suggests that the Legislature had no intention of limiting the scope of the statute to any prior existing situations; rather, it intended that the procedures set out in the Law Against Discrimination be

available to remedy any charge of unlawful discrimination in respect to housing. Even if the verb "built" be narrowly construed so that only houses constructed with public assistance, rather than houses constructed or owned by means of public assistance, *N. J. S. A.* 18:25-9.1 still applies to the developments in question. As we pointed out above, the housing with which we are concerned owes its existence to federally insured purchase money loans which create a mass market for consumption of the product produced by plaintiffs. There is no express provision in the statute providing that the public assistance be given directly to achieve the construction of the housing. And to construe public assistance as referring to indirect as well as direct help would seem to conform to the ends sought to be achieved by the Legislature by enacting the Law Against Discrimination. We hold, therefore, that *N. J. S. A.* 18:25-1 *et seq.* applies to the plaintiffs' developments in question.

III.

The plaintiffs do not argue, and hence we do not decide, whether by restricting their ability to dispose of their property as they choose the statute in question violates due process. See *O'Meara* v. *Washington State Bd. Against Discrimination, No.* 535996 (*Super. Ct. King Cty., Washington State* 1959) (not officially reported); *Ayins, Trade Regulations, Survey of the Law of New Jersey*, 1956-1957; 12 *Rutgers L. Rev.* 149, 150-160 (1957). But see *New York State Commission Against Discrimination* v. *Pelham Hall Apartments*, 10 *Misc.* 2*d* 334, 170 *N. Y. S.* 2*d* 750 (*Sup. Ct.* 1958); *Note*, 107 *U. Pa. L. Rev.* 515, 525-530 (1959); *Note*, 12 *Rutgers L. Rev.* 557, 558-567 (1958). There is ample support for a conclusion that lack of adequate housing for minority groups, an effect of discrimination in housing causes crime- and disease-breeding slums. See *Berman* v. *Parker*, 348 *U. S.* 26, 33-34, 75 *S. Ct.* 98, 99 *L. Ed.*

27 (1954); *Crommett* v. *City of Portland*, 150 *Me.* 217, 107 *A. 2d* 841, 850 (*Sup. Jud. Ct.* 1953); *New York City Housing Authority* v. *Muller*, 270 *N. Y.* 333, 1 *N. E. 2d* 153, 154, 105 *A. L. R.* 905 (*Ct. App.* 1936); *City of Newark* v. *Charles Realty Co.*, 9 *N. J. Super.* 442, 453-456 (*Cty. Ct.* 1950). Freedom with regard to property is not inviolable; it is subject to the reasonable exercise of the Legislature's police power. *Village of Euclid, Ohio* v. *Ambler Realty Co.*, 272 *U. S.* 365, 47 *S. Ct.* 114, 71 *L. Ed.* 303 (1926); *Block* v. *Hirsh*, 256 *U. S.* 135, 41 *S. Ct.* 458, 65 *L. Ed.* 865 (1921). The presumption is in favor of constitutionality, *Gibraltar Factors Corp.* v. *Slapo*, 23 *N. J.* 459, 463 (1957), and the burden of proof and persuasion is heavy on the party contesting the statute. In the absence of a showing of clear abuse of the police power, the tendency is to leave the wisdom of the statute as a political rather than judicial question. We may pass this question without decision, however, and proceed to consider matters briefed and argued by the parties.

IV.

The plaintiffs argue that the Law Against Discrimination, by including within its purview only publicly assisted housing, creates an unreasonable and arbitrary classification in violation of the *Fourteenth Amendment* to the *United States Constitution* and the *New Jersey Constitution* 1947, *Article* I, *Section* 1. They argue that the relationship between the end towards which the statute is directed and the class to which it is applicable is not based on reasonable grounds. In other words, since the statute was intended to eliminate discrimination in housing, it must apply to housing generally, and since there is no difference between publicly assisted housing and housing generally insofar as the ability to discriminate or its effects are concerned, the distinction, and hence the statute, must fall.

As we indicated above, the presumption favors the constitutionality of the statute and it will be upheld unless

facts judicially known or proved refute that presumption. *Clark* v. *Paul Gray, Inc.*, 306 *U. S.* 583, 594, 59 *S. Ct.* 744, 83 *L. Ed.* 1001 (1939); *Gibraltar Factors Corp.* v. *Slapo*, 23 *N. J.* 459, 463 (1957). The strong burden on the party attacking the constitutionality of a legislative classification (*New Jersey Restaurant Ass'n, Inc.* v. *Holderman*, 24 *N. J.* 295, 300 (1957)) has been expressed in various formulae. Thus, the classification will be sustained unless it causes invidious discrimination. *Morey* v. *Doud*, 354 *U. S.* 457, 463, 77 *S. Ct.* 1344, 1 *L. Ed.* 2d 1485 (1957); *Schmidt* v. *Board of Adjustment*, 9 *N. J.* 405, 418 (1952). The Legislature must only avoid arbitrary discrimination between persons similarly circumstanced. *Gundaker Central Motors, Inc.* v. *Gassert*, 23 *N. J.* 71, 80 (1957), appeal dismissed 354 *U. S.* 933, 77 *S. Ct.* 1397, 1 *L. Ed.* 2d 1533 (1958). But it is not sufficient to show that there are others equally guilty of the evil to be remedied to which the statute could have been made to apply. As was stated in *New Jersey Restaurant Ass'n, Inc.* v. *Holderman*, 24 *N. J.* 295, 300 (1957):

> "• • • It is easily stated that the classification (1) must not be palpably arbitrary or capricious, and (2) must have a rational basis in relation to the specific objective of the legislation. But the second proposition is qualified by limitations which compound the difficulties of one who assails the legislative decision. Thus it is not enough to demonstrate that the legislative objective might be more fully achieved by another, more expansive classification, for the Legislature may recognize degrees of harm and hit the evil where it is most felt. [citing cases] The Legislature may thus limit its action upon a decision to proceed cautiously, step by step, or because of practical exigencies, including administrative convenience and expense, • • • or because of 'some substantial consideration of public policy or convenience

> or the service of the general welfare.' * * * Hence it may 'stop short of those cases in which the harm to the few concerned is thought less important than the harm to the public that would ensue if the rule laid down were made mathematically exact.' "

Considering the circumstances which led to the enactment of the statute in question, it becomes apparent that the classification presents no constitutional difficulties. We may note the pressing need for adequate housing for minority groups. Many more in these groups than at present would be in a position to take an active and beneficial role in the cultural, social and economic life of the community were they given an opportunity, and a vital factor in affording this opportunity is access to normal housing accommodations. The portion of the statute in question which relates to housing may be viewed as a means chosen to ease the housing problem facing minority groups. It may be argued that the main purpose is to secure some measure of adequate housing for minorities and only incidentally to this purpose is discrimination proscribed. The desired end may be achieved by legislating in regard only to a specific kind of housing. And the type of housing chosen is that most easily financed and as to which established patterns would least likely be disturbed. If these goals are not the intent of the Legislature, they do at least serve to demonstrate, insofar as they give a reasonable basis for the statutory classification, that the statute is not invalid on its face or palpably arbitrary. *Cf. Sage Stores Co. v. State of Kansas*, 323 *U. S.* 32, 35, 65 *S. Ct.* 9, 89 *L. Ed.* 25 (1944); *Jamouneau v. Harner*, 16 *N. J.* 500, 519-520 (1954), *certiorari* denied 349 *U. S.* 904, 75 *S. Ct.* 580, 99 *L. Ed.* 1241 (1955); *Reingold v. Harper*, 6 *N. J.* 182, 194 (1951). In the absence of a showing of an actual injury to the plaintiffs, which was not attempted in the proofs, we cannot declare the legislation unconstitutional. Thus, the means chosen by the Legislature to accom-

plish its goals are not unreasonable, and on that basis we hold that plaintiffs' argument that the Law Against Discrimination incorporates an unconstitutional classification is without merit.

V.

In their brief, plaintiffs make the argument that:

> "The Law Against Discrimination, by singling out federally assisted housing for special regulation without providing for correlative regulations of all state assisted housing unconstitutionally discriminates against rights conferred by federal law."

The premise is that *N. J. S. A.* 18:25-5(*k*) is a definitive enumeration for purposes of the statute of all kinds of "publicly assisted housing accommodation" as used in *N. J. S. A.* 18:25-4. As we held above, this notion is incorrect. And the whole argument must fall with the premise on which it is based.

VI.

The plaintiffs next argue that the Law Against Discrimination invades a legislative field preempted by Congress and is for this reason invalid, citing *Commonwealth of Pennsylvania* v. *Nelson*, 350 *U. S.* 497, 76 *S. Ct.* 477, 100 *L. Ed.* 640, rehearing denied 351 *U. S.* 934, 76 *S. Ct.* 785, 100 *L. Ed.* 1462 (1956), and *Hill* v. *State of Florida*, 325 *U. S.* 538, 65 *S. Ct.* 1373, 89 *L. Ed.* 1782, rehearing denied 326 *U. S.* 804, 66 *S. Ct.* 11, 90 *L. Ed.* 489 (1945). Plaintiffs state that "Congress, as an integral part of its legislative program, determined not to prohibit discrimination in the sale or lease of FHA insured housing," and reason from this is that any state law having that effect would violate congressional policy and the rule of preemption.

There is a considerable gap between Congress' refusing to adopt an express policy of non-discrimination in

regard to FHA insured housing, to be applicable under all circumstances and in all sections of the country, and a congressional policy prohibiting states from enacting laws proscribing such discrimination. Congress did refuse to accept amendments to various versions of the National Housing Act which would have expressly prohibited the discrimination with which plaintiffs are charged. Comment, 59 *Colum. L. Rev.* 782, 784, n. 17 and text accompanying (1959). But to construe this action as establishing a congressional policy against state laws having the same effect is not warranted by the circumstances. Failure of Congress to incorporate in the National Housing Act a positive imposition of a policy of non-discrimination with its necessary national implications may be grounded in political expediency to secure its enactment and, in any event, such a provision would not account for local conditions and the effect of such a policy, on a local basis, on the national housing program. But state laws incorporating such a policy, taking into account and being expressly designed to meet purely local conditions and attitudes, are not subject to the same difficulty. Thus there appears reason why Congress might have rejected a non-discrimination amendment to the National Housing Act and yet not be opposed to state laws achieving the same result. It would be unsound, therefore, to conclude that the Law Against Discrimination invades a legislative area preempted by Congress.

VII.

Finally, plaintiffs argue that the statute in question conflicts with the National Housing Act and hence is invalid under the supremacy clause of the *Federal Constitution, Article* VI, *paragraph* 2. Insofar as this argument rests on a supposed frustration by the Law Against Discrimination of a congressional policy of permitting discrimination with respect to FHA insured housing, it is sufficient

to point to our discussion of the argument concerning federal preemption, above, where we hold that Congress did not intend to exempt FHA insured housing from the operation of state laws prohibiting discrimination with respect to such housing. Unlike in *Johnson* v. *State of Maryland*, 254 *U. S.* 51, 41 *S. Ct.* 16, 65 *L. Ed.* 126 (1920); *Leslie Miller, Inc.* v. *State of Arkansas*, 352 *U. S.* 187, 77 *S. Ct.* 257, 1 *L. Ed.* 2*d* 231 (1956), and *Public Utilities Comm. of State of Cal.* v. *United States*, 355 *U. S.* 534, 78 *S. Ct.* 446, 2 *L. Ed.* 2*d* 470, rehearing denied 356 *U. S.* 925, 78 *S. Ct.* 713, 2 *L. Ed.* 2*d* 760 (1958), cited by plaintiffs as supporting their position, there is no conflict between state and federal power which might undermine the intent or purpose of the federal law or operation. *Cf. Stuyvesant Town, Inc.* v. *Lighom*, 17 *N. J.* 473, 496 (1955). Thus the statute creates no difficulties under *Article* VI, *paragraph* 2 of the *United States Constitution*.

Conclusion.

We hold, therefore, that the public assistance rendered to the housing in question places it within the purview of the Law Against Discrimination and that the Division Against Discrimination in the State Department of Education has jurisdiction to hear and decide the charges brought against plaintiffs by the individual defendants, and that the statute on which the jurisdiction is based is valid. Thus the relief sought by plaintiffs in their action in lieu of prerogative writs cannot be granted, and the cause must be returned to the Division Against Discrimination in the State Department of Education for disposition. The judgments appealed from are affirmed.

For affirmance—Justices Burling, Jacobs, Francis, Proctor, Hall and Schettino—6.

For reversal—None.

Mandate on Affirmance.

SUPREME COURT OF NEW JERSEY,

APPEAL DOCKET No. 2983.

LEVITT AND SONS, INCORPORATED, a New York corporation, Plaintiff-Appellant, *vs.* DIVISION AGAINST DISCRIMINATION IN THE STATE DEPARTMENT OF EDUCATION, WILLIS R. JAMES and FRANKLIN D. TODD, Defendants-Respondents.	Civil Action. On Appeal.

This cause having been duly argued before this Court by Mr. Harold E. Kohn, of the Philadelphia Bar, counsel for the appellant, and Mr. David D. Furman, Attorney General of New Jersey, counsel for the respondent, Division Against Discrimination in the State Department of Education, and Mr. Julius Wildstein, counsel for all individual Respondents, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court—Appellate Division is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court—Appellate Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable JOSEPH WEINTRAUB, Chief Justice, at Trenton on the ninth day of February, 1960.

s/ JOHN H. GILDEA
Clerk of the Supreme Court.

Appendix B.

OPINION OF APPELLATE DIVISION.

SUPERIOR COURT OF NEW JERSEY,

APPELLATE DIVISION.

A-334-58 and A-335-58.

LEVITT AND SONS, INCORPORATED,
a New York Corporation, and WILLIAM J. LEVITT,
Plaintiffs-Appellants,

v.

DIVISION AGAINST DISCRIMINATION IN THE STATE DEPARTMENT OF EDUCATION, WILLIE R. JAMES and FRANKLIN D. TODD,
Defendants-Respondents,

and

GREEN FIELDS FARM, INC., a New Jersey Corporation, and ROBERT A. BUDD and HORACE B. PETERS,
Plaintiffs-Appellants,

v.

DIVISION AGAINST DISCRIMINATION IN THE STATE DEPARTMENT OF EDUCATION and YUTHER GARDNER,
Defendants-Respondents.

Argued April 20, 1959. Decided July 22, 1959.

Before Judges PRICE, SULLIVAN and FOLEY.

The opinion of the court was delivered by

PRICE, S. J. A. D. The basic issue raised by these appeals is whether or not the corporate plaintiffs, Levitt and Sons,

Incorporated (Levitt) and Green Fields Farm, Inc. (Green), real estate developers of "Levittown" and of an area of "Green Fields Village," respectively, are, in the operation of those developments, subject to the provisions of the "Law Against Discrimination" (*N. J. S. A.* 18:25-1 *et seq.*) which it was charged they violated. The charges of discrimination were made in amended complaints filed by respondents James, Todd and Gardner in the Department of Education of the State of New Jersey, Division Against Discrimination. It was claimed in the *Levitt* case that appellants refused to sell houses to defendants James and Todd because of their race and in the *Green* case a similar accusation was made, as to defendant Gardner. Defendants James, Todd and Gardner are negroes.

In each of the above cases plaintiffs instituted an action in lieu of prerogative writ in the Superior Court, Law Division. In those actions plaintiffs, challenging the asserted jurisdiction of the Division Against Discrimination, contended, *inter alia*, that (1) allegations in the amended complaints in the Division that they had violated *N. J. S. A.* 18:25-9.1 were without foundation in that they were not charged with any substantive acts of discrimination which might properly form the basis of complaints before the administrative agency; (2) the defendant Division was without statutory authority with reference to any housing other than public or *quasi*-public housing constructed in accordance with certain enumerated statutory enactments unrelated to plaintiffs' housing developments; (3) the 1957 amendment to the Law Against Discrimination (*L.* 1957, *c.* 66, *p.* 128), assertedly construed by the Division as conferring jurisdiction upon it to deal with plaintiffs' housing developments, is unconstitutional; and (4) the cause of action against the individual plaintiffs is barred by the limitation contained in the Law Against Discrimination.

On plaintiffs' applications the court issued orders staying proceedings in the Division Against Discrimination and directing defendants to show cause why the restraints should not be continued until after the disposition of the court actions. Thereafter the court, on defendants' motions, dismissed the complaints and dissolved the aforesaid restraints. Its action was based on its determination that it was without jurisdiction over the subject matter of the action, which jurisdiction it considered was vested in the Appellate Division, to be exercised as provided in *R. R.* 4:88-8(*b*), and because "plaintiffs have failed to exhaust their administrative remedies" before the Division. Orders reflecting the court action were entered February 19, 1959.

Following plaintiffs' appeals to this court from said orders, and on motions by plaintiffs for orders staying the performance and enforcement of the aforesaid orders of the trial court and staying further proceedings in the Division, we entered the following order in the *Levitt* case and a comparable order in the *Green* case:

> "The Court, on its own motion, having decided to consider the within appeal also as a request by plaintiffs-appellants for leave to appeal to this Court from the setting down for hearing by defendant-respondent, Division Against Discrimination in the State Department of Education, before it the matter of the amended complaints filed by said defendants-respondents, Willie R. James and Franklin D. Todd, in the proceedings aforesaid, with leave granted for such appeal, so that the merits of the complaint filed by these plaintiffs-appellants in the Law Division of the Superior Court may be determined by this Court in this appeal;
>
> It is, on this 10th day of March, 1959, Ordered:
>
> 1. The performance and enforcement of the said order entered in the Law Division of the Superior

Court and the proceedings before defendant-respondent, Division Against Discrimination in the State Department of Education, be and the same are hereby stayed pending a determination and disposition of this appeal."

Each of the aforesaid developments, in which plaintiffs are respectively engaged, involves the construction of one-family houses. The record reveals that it is planned that the Levittown development will, over a period of five to seven years, involve the construction of approximately 16,000 houses. The Green Fields Village development is divided into three parts on two of which 506 houses have been constructed and on the third of which plaintiff Green has erected 52 houses, of which "eight or nine" remained unsold at the time plaintiff Budd, president of Green, gave his deposition on December 22, 1958.

The record presented to us shows that the Federal Housing Administration (FHA) agreed by written "conditional commitments" to insure mortgages made by purchasers of Levittown houses to an approved lending institution. FHA issued at least 1089 such commitments. Similar arrangements were made with reference to the Green Fields Village properties, with additional undertaking by FHA that with reference to any house in the development it would insure the mortgage if the builder became the mortgagor. These commitments on the part of FHA, issued in large numbers, were called "firm commitments with additional provisions" or "operative-builder firm commitments." The evidence showed that an operative-builder firm commitment, although similar in form to a conditional commitment, covers a situation in which if the developer (operative-builder) is unsuccessful in marketing a completed house, the FHA "agrees to insure a mortgage where the operative-builder is the mortgagor * * *." However, according to deposition by Michael

Albert, Director of the South Jersey District of FHA, the FHA "has not endorsed for insurance any mortgages in the name of the operative builder, that is Green Fields Farm, Inc." The procedure followed was outlined by him. Prior to the issuance of FHA mortgage commitments initial application for site approval has to be made by the "operative builder in order to determine eligibility of the site." When the site is found to be "generally acceptable" to FHA it issues a "subdivision report" designating its "requirements concerning drainage, street layouts, parks, curbs, sidewalks, utilities, including water and sewage disposal, and on site improvements including top soil, streets, trees, driveways, entrance walks, finish grade, etc."; thereafter the builder "will arrange with an FHA Approved Mortgagee to submit individual applications for commitments to FHA." These applications are processed by the Architectural, Valuation and Mortgage Credit Sections and the Chief Underwriter's Office. Thereafter commitments are normally issued to the approved mortgagee with reference to the respective properties. Following the issuance of the conditional commitment or operative builder firm commitment the builder starts construction during the course of which FHA construction inspectors make periodic inspections. Mr. Albert testified that because of the large size of Levittown a full time FHA inspector was at the development to make inspections on the basis of schedules furnished by the builder.

"As the builder markets his houses, an application for each prospective home buyer is prepared and submitted to FHA by the Approved Mortgagee." On satisfactory credit report an "Individual Firm Commitment in the name of the applicant is issued to the Approved Mortgagee." After title closing the "Approved Mortgagee submits to the FHA" the copies of the bond and mortgage and the executed commitments, following review of which "the origi-

nal bond is endorsed by FHA for mortgage insurance and returned to the mortgagee."

The record also shows that Mr. Albert testified that the FHA mortgages are available for approved loans at a rate of 5¼% and for periods up to 30 years, in contrast with a 5½% rate and a maximum of 20 to 25 years offered by conventional financing; that the prospective purchaser in a development such as that of plaintiffs is advised of the availability of FHA financing and furnished with a pamphlet containing information referable thereto.

The pertinent provisions of the "Law Against Discrimination" are as follows:

> *N. J. S. A.* "18:25-4. Employment and accommodations without discrimination; civil right
>
> All persons shall have the opportunity to obtain employment, to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation and publicly assisted housing accommodation, without discrimination because of race, creed, color, national origin or ancestry, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right." (Effective June 4, 1957)
>
> *N. J. S. A.* "18:25-5. Definitions
>
> As used in this act, unless a different meaning clearly appears from the context:
>
> • • • • • •
>
> d. 'Unlawful employment practice' and 'unlawful discrimination' includes only those unlawful practices and acts specified in section 11 of this act. [*N. J. S. A.* 18:25-12]
>
> • • • • • •
>
> k. 'A publicly assisted housing accommodation' shall include all housing built with public funds or

public assistance pursuant to chapter 300 of the laws of 1949, chapter 213 of the laws of 1941, chapter 169 of the laws of 1944, chapter 303 of the laws of 1949, chapter 19 of the laws of 1938, chapter 20 of the laws of 1938, chapter 52 of the laws of 1946, and chapter 184 of the laws of 1949, and all housing financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the Federal Government or any agency thereof."

N. J. S. A. "18:25-6. Division against Discrimination in State Department of Education created; powers

There is created in the State Department of Education a division to be known as 'The Division Against Discrimination' with power to prevent and eliminate discrimination in employment against persons because of race, creed, color, national origin or ancestry or because of their liability for service in the armed forces of the United States, by employers, labor organizations, employment agencies or other persons and to take other actions against discrimination because of race, creed, color, national origin or ancestry or because of their liability for service in the armed forces of the United States, as herein provided; and the division created hereunder is given general jurisdiction and authority for such purposes."

N. J. S. A. "18:25-9.1. Enforcement of laws against discrimination in houses built with public funds or assistance

The Division Against Discrimination in the State Department of Education shall enforce the laws of this State against discrimination in housing built with public funds or public assistance, pursuant to

any law, because of race, religious principles, color, national origin or ancestry. The said laws shall be so enforced in the manner prescribed in the act to which this act is a supplement."

N. J. S. A. 18:25-12, to which reference is above made, enumerates acts which constitute unlawful employment practice or unlawful discrimination but contains no reference to discrimination in housing of any sort.

N. J. S. A. 18:25-13 states that a person "claiming to be aggrieved by * * * an unlawful discrimination" may file a complaint against the party alleged to have committed the "unlawful discrimination complained of."

Plaintiffs contend that *N. J. S. A.* 18:25-9.1 "does not establish any act of discrimination upon which a complaint may be founded"; that the "housing in question is not within the purview of that section"; that except "as to public or *quasi*-public housing, the jurisdiction of the Division Against Discrimination is limited to those acts of discrimination which are set forth in *R. S.* 18:25-12" and that "housing is not included in such delegated jurisdiction."

They urge that *N. J. S. A.* 18:25-5, *subd. d*, limits unlawful discrimination to those acts set forth in *N. J. S. A.* 18:25-12 other than "those connected with public or *quasi*-public housing as provided for in statutes designated in *R. S.* 18:25-9.1," and that therefore the alleged act of discrimination is not a statutory unlawful act of discrimination; hence the statute provides no justification for such complaint as was here made before the Division.

Plaintiffs further assert that when the Legislature amended the Law Against Discrimination in 1957 (*L.* 1957, *c.* 66, *p.* 128) making the right of access to publicly assisted housing accommodations a civil right, it omitted to amend *N. J. S. A.* 18:25-12, the section which assertedly specifies the acts of discrimination under which the Division has

jurisdiction; that while "the failure of the Legislature to have conferred upon the Division Against Discrimination, under section 14 (*R. S.* 18:25-12), the power argued for by the defendants herein, might have been the result of an inadvertent omission," it "may well have been intentional"; that defendants' argument that if the court were to accept plaintiffs' position, the 1957 amendment, purporting to deal with 'publicly assisted' housing, would be futile legislation and that there would be no remedy for something which the Legislature sought to eliminate" is of no force; that it "would not be the first time that our courts have ruled that the Legislature did indeed adopt futile legislation." They cite in support of this argument *State* v. *Fair Lawn Service Center, Inc.*, 20 *N. J.* 468, 470 (1956). (However, see *Gundaker Central Motors, Inc.* v. *Gassert*, 23 *N. J.* 71, 83 (1956).)

Plaintiffs next contend that the aforesaid 1957 amendment to the Law Against Discrimination, "if construed to apply to plaintiffs and the housing in question," violates the Fourteenth Amendment to the Federal Constitution and paragraph 1 of Article I of the New Jersey Constitution. They assert that section 4 of the act (*N. J. S. A.* 18:25-4) "declaring it to be a civil right for all persons * * * to 'have the opportunity to obtain * * * the accommodations, advantages, facilities and privileges of any * * * publicly assisted housing accommodation * * *'," (*L.* 1957, *c.* 66, *p.* 128, § 1), and the addition of the aforesaid subsection *k* to the definitions defining a "publicly assisted housing accommodation" to include "all housing financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the Federal Government or any agency thereof" (*L.* 1957, *c.* 66, *p.* 128, § 2), impinge on federal policy.

In support of their contention plaintiffs claim that said amendments constitute "an assumption by the state legis-

lature of the exclusive federal power to determine requirements for the receipt of benefits conferred by federal acts," and represent "the adoption of a classification system wholly foreign and unrelated to the purpose of non-discrimination sought to be achieved."

Respondent Division contends, as set forth in its brief:

> "1. That the statute applies to all housing 'financed' by FHA mortgage loans, and that such housing includes not only that on which FHA has already guaranteed a mortgage, but all housing in the course of planning and construction under procedures established by FHA to qualify the development for FHA guaranteed mortgages;
>
> 2. That in any event, the statute covers all 'publicly assisted housing,' and therefore includes any housing which has received material assistance in any way by operations or services of FHA;
>
> 3. That on either line of reasoning, plaintiffs' housing at Levittown and Green Fields Village, respectively, plainly falls within the scope of the law and within the enforcement powers of the Division Against Discrimination;
>
> 4. That the statute as so construed is valid and constitutional as a reasonable exercise of the police power of the State and in fulfillment of the provisions of the Constitution of New Jersey guaranteeing civil rights (*N. J. S. A.* 18:25-2)."

We hold that plaintiffs' contention that the housing in question is not "publicly assisted housing accommodation" within the meaning of *N. J. S. A.* 18:25-4 is without merit. To hold otherwise would require us to ignore the large scale operation of FHA in connection with plaintiffs' develop-

ments, the details of which have been above outlined. It is fair to conclude from the record before us that plaintiffs would not have undertaken the developments if they had not been assured of the availability of FHA financing.

We further hold that, as *N. J. S. A.* 18:25-4 and *N. J. S. A.* 18:25-5, *subd. k*, create and define the civil right involved, the Division is empowered by statute to "enforce the laws of this State against discrimination in housing built with public funds or public assistance, *pursuant to any law.*" (Emphasis supplied) (*N. J. S. A.* 18:25-9.1). We are in accord with defendants' contention that the "laws of this State" mean the laws in effect at the time of the passage of *N. J. S. A.* 18:25-9.1 (1954) and all laws thereafter enacted, including *N. J. S. A.* 18:25-4 (1957). We also hold that Article I, paragraph 5 of the New Jersey Constitution is a "law" of the State within the meaning of *N. J. S. A.* 18:25-9.1 either considered by itself (*Marbury v. Madison*, 1 *Cranch* 137, 138, 5 U. S. 137, 2 *L. Ed.* 60 (1803)) or as implemented by *N. J. S. A.* 18:25-4.

We hold that plaintiffs have not shown a federal preemption of the field which would render nugatory state action forbidding racial discrimination in FHA housing. Neither do we find any merit in plaintiffs' contention that the 1957 amendment established "an unreasonable system of classification." See *New York State Commission Against Discrimination v. Pelham Hall Apartments*, 10 *Misc. 2d* 334, 170 *N. Y. S. 2d* 750 (*Sup. Ct.* 1958); 12 *Rutgers L. Rev.* 557 (1958).

The following philosophy pronounced in *Taylor v. Leonard*, 30 *N. J. Super.* 116, 121 (*Ch. Div.* 1954), is basic and applicable to the case at bar:

> "The eventual survival of any form of government necessarily depends on the equal apportionment of the rights and privileges of citizenship as

> well as its obligations and duties among all its citizens irrespective of race, color or creed. Such a principle has long since been the keystone of our national and state form of government."

Contention is finally made by the individual plaintiffs that action in the Division against them (who were officers of plaintiff corporations) is barred by time limitations in the statute itself (*N. J. S. A.* 18:25-18). The section provides that "any complaint filed pursuant to this section must be so filed within ninety days after the alleged act of discrimination." In the Levitt case plaintiffs assert that the acts of discrimination are alleged to have occurred June 28 and June 29, 1958, and the amended complaint was filed "no earlier than October 20, 1958"; in the *Green Fields* case the corresponding dates are October 9, 1957 and "no earlier than September 23, 1958." They contend that an amended complaint "cannot relate back to the date of the original complaint as to new parties," and the date of filing the amended complaint is the controlling date in determining whether the action is barred by the limitation imposed.

Defendants seek to justify the amendments, as filed within time, on the following grounds (as stated in the brief of the individual respondents):

> "(1) the amended complaints admittedly charge substantially the same acts as the original complaints. They merely add the officers who own or control and direct the corporations initially charged with the alleged acts of discrimination • • • (2) the said acts constituted continuing acts of discrimination up to the date of the filing of said amended complaint, it being charged in each of said amended complaints that: 'The aforesaid action of respondents (plaintiffs herein) was taken pursuant to a com-

mon and consistent scheme and plan to deny to Negroes the right to buy homes in the aforesaid development * * *.' (3) the Law Against Discrimination (*R. S. Cum. Supp.* 18:25-16) authorizes the Commissioner or the complainant 'reasonably and fairly to amend any complaint' without limitation as to time; (4) the Commissioner, in exercising his discretion authorizing and allowing the filing of the amended complaint, deemed said amended complaint fair and reasonable, and the exercise of such discretion has not been challenged by plaintiffs in these or any other proceedings; nor have the plaintiffs charged that they suffered any loss or prejudice as a result of said amendment."

The Division further contends in its brief that the amendment is justified because *R. R.* 4:34, governing civil practice in the Superior Court, provides that "parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just"; that although the court rules do not govern proceedings in the Division "they furnish an appropriate guide to what is fair and reasonable. * * *"

We are not in accord with these contentions. As to the specific dates of alleged discrimination, the 90-day period had long since expired. The fact that the allegation is made in the complaint before the Division that the action criticized "was taken pursuant to a common and consistent scheme and plan to deny to Negroes the right to buy homes in the aforesaid development" does not justify the further conclusions asserted in the Division's brief that:

"* * * Consequently, the last 'act of discrimination' within the meaning of the Law was not the par-

ticular transaction which took place in the Levitt case on June 28, 1958, or in the Green Fields case on October 9, 1957, but the prevention of the complainants from purchasing homes in the developments, and this continued right up to the date when the amended complaints were filed."

Having determined that the Law Against Discrimination applies to the housing developments undertaken by the corporate plaintiffs and, so applied, is constitutional and valid, we further hold that the complaints before the Division Against Discrimination state a cause of action within the enforcement jurisdiction of the Division.

As to the corporate appellants the stay heretofore entered is vacated to the end that the proceedings before the Division may be prosecuted as aforesaid. The complaints in the Division against appellants William J. Levitt, Robert A. Budd and Horace B. Peters are barred by the aforesaid 90-day limitation. Remanded for action not inconsistent with this opinion.

Appendix C.

CAL. HEALTH AND SAFETY CODE, §35710, as supplemented by CAL. LAWS 1959, ch. 1681.

"**§35710 Definitions: 'Person': 'Housing accommodation': 'Publicly assisted housing accommodation': 'Owner': 'Discriminate': 'Multiple dwelling': 'Family': 'Boarder': 'Roomer': 'Lodger'.** When used in this part:"

. . . . . .

"3. The term 'publicly assisted housing accommodation' includes any housing accommodation within the State:

(a) Which at the time of any alleged unlawful discrimination under Section 35720 is granted exemption in whole or in part from taxes levied by the State or any of its political subdivisions; provided, that nothing herein contained shall apply to any housing accommodations solely because the owner thereof enjoys any type of tax exemption by virtue of his veteran status.

(b) Which is constructed on land sold below cost by the State or any of its political subdivisions or any agency thereof, pursuant to the Federal Housing Act of 1949.

(c) Which is constructed in whole or in part on property acquired or assembled by the State or any of its political subdivisions or any agency thereof through the power of condemnation or otherwise for the purpose of such construction; provided, that nothing herein contained shall apply to any housing accommodation constructed in whole or in part on any property acquired by the Department of Veterans Affairs under the Veterans' Farm and Home Purchase Act of 1943.

(d) Which is located in a multiple dwelling and the acquisition, construction, rehabilitation, repair or maintenance of which is financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the Federal Government or any agency thereof, or the State or any of its political subdivisions or any agency thereof.

(e) Which is offered for sale by a person who owns or otherwise controls the sale of five or more housing accommodations located on land that is contiguous (exclusive of public streets), if (1) the acquisition, construction, rehabilitation, repair or maintenance of such housing accommodations is financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the Federal Government or any agency thereof, or the State or any of its political subdivisions or any agency thereof, or (2) a commitment, issued by a government agency is outstanding that acquisition of such housing accommodations may be financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the Federal Government or any agency thereof, or the State or any of its political subdivisions or any agency thereof.

4. The term 'owner' includes the lessee, sublessee, assignee, managing agent, or other person having the right of ownership or possession or the right to rent or lease housing accommodations and includes the State and any of its political subdivisions and any agency thereof.

5. The term 'discriminate' includes to segregate or separate.

6. The term 'multiple dwelling' means a dwelling which is occupied, as a rule, for permanent residence purposes and which is either rented, leased, let or hired out, to be occupied as the residence or home of three or more families living independently of each other. A 'multiple dwelling' shall not be deemed to include a hospital, convent, monastery, public institution, or a fireproof building used wholly for commercial purposes except for not more than one janitor's apartment and not more than one penthouse occupied by not more than two families. The term 'family' means either a person occupying a dwelling and maintaining a household, with not more than four boarders, roomers or lodgers, or two or more persons occupying a dwelling, living together and maintaining a common household, with not more than four boarders, roomers or lodgers. A 'boarder,' 'roomer' or 'lodger' residing with a family means a person living within the household who pays a consideration for such residence and does not occupy such space within the household as an incident of employment therein."

Appendix C.

CONN. GEN. STATS. Sec. 53-35, as amended by PUB. ACTS 1959, ch. 113

"Sec. 53-35. Discrimination in public accommodations and rental housing on account of race, creed or color. All persons within the jurisdiction of this state shall be entitled to full and equal accommodations in every place of public accommodation, resort or amusement, subject only to the conditions and limitations established by law and applicable alike to all persons; and any denial of such accommodation by reason of race, creed or color of the applicant therefor shall be a violation of the provisions of this section. Any discrimination, segregation or separation, on account of race, creed or color, shall be a violation of this section. A place of public accommodation, resort or amusement within the meaning of this section means any establishment, which caters or offers its services or facilities or goods to the general public including, but not limited to, public housing projects and all other forms of publicly assisted housing, and further including any housing accommodation offered for sale or rent which is one of five or more housing accommodations all of which are located on a single parcel of land or parcels of land that are contiguous without regard to highways or streets, and all of which any person owns or otherwise controls the sale or rental thereof. Any person who violates any provision of this section shall be fined not less than twenty-five nor more than one hundred dollars or imprisoned not more than thirty days or both."

Appendix C.

MASS. GEN. LAWS, ch. 151B, §1, as supplemented by MASS. LAWS 1957, ch. 426, §1.

"§1. **Definitions.**

. . . . . .

"10. The term 'publicly assisted housing accommodations' includes all housing accommodations in

"(a) housing constructed after July first, nineteen hundred and fifty, and

"(1) which is exempt in whole or in part from taxes levied by the commonwealth or any of its political subdivisions;

"(2) which is constructed on land sold below cost by the commonwealth or any of its political subdivisions or any agency thereof, pursuant to the federal housing act of nineteen hundred and forty-nine;

"(3) which is constructed in whole or in part on property acquired or assembled by the commonwealth or any of its political subdivisions or any agency thereof through the power of condemnation or otherwise for the purpose of such construction; or

"(4) for the acquisition, construction, repair or maintenance of which the commonwealth or any of its political subdivisions or any agency thereof supplies funds or other financial assistance;

"(b) housing which is located in a multiple dwelling, the acquisition, construction, rehabilitation, repair or maintenance of which is, after October first, nineteen hundred and fifty-seven, financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency

thereof, provided, that such a housing accommodation shall be deemed to be publicly assisted only during the life of such loan and such guaranty or insurance; and

"(c) housing which is offered for sale, lease or rental by a person who owns or otherwise controls the sale of the same, and which is part of a parcel of ten or more housing accommodations located on land that is contiguous, exclusive of public streets, if (1) the acquisition, construction, rehabilitation, repair or maintenance of such housing accommodations is after October first, nineteen hundred and fifty-seven, financed in whole or in part by a loan whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof; provided, that such a housing accommodation shall be deemed to be publicly assisted only during the life of such loan and guaranty or insurance; or (2) a commitment issued by a government agency after October first, nineteen hundred and fifty-seven, is outstanding that acquisition of such housing accommodations may be financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof."

Appendix C.

N. Y. Civil Rights Law, Art. 2-A, §18-b, as supplemented by N. Y. Laws 1950, ch. 287, and amended by N. Y. Laws 1955, ch. 341.

"**§18-b. Definitions.**

"When used in this article:

* * * * * *

3. The term 'publicly assisted housing accommodation' includes any housing accommodation within the state of New York

(a) which, after July first, nineteen hundred fifty, is granted exemption in whole or in part from taxes levied by the state or any of its political subdivisions;

(b) which is constructed after July first, nineteen hundred fifty, on land sold below cost by the state or any of its political subdivisions or any agency thereof, pursuant to the federal housing act of nineteen hundred forty-nine;

(c) which is constructed after July first, nineteen hundred fifty, in whole or in part on property acquired or assembled by the state or any of its political subdivisions or any agency thereof through the power of condemnation or otherwise for the purpose of such construction;

(d) for the acquisition, construction, repair or maintenance of which the state or any of its political subdivisions or any agency thereof supplies, after July first, nineteen hundred fifty, funds or other financial assistance;

(e) (1) which is located in a class A multiple dwelling as defined in section four of the multiple dwelling law; and (2) the acquisition, construction, rehabilitation, repair or maintenance of which is,

after July first, nineteen hundred fifty-five, financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions or any agency thereof, provided that such a housing accommodation shall be deemed to be publicly assisted only during the life of such loan and such guaranty or insurance; or

(f) which is offered for sale by a person who owns or otherwise controls the sale of ten or more housing accommodations located on land that is contiguous (exclusive of public streets), if (1) the acquisition, construction, rehabilitation, repair or maintenance of such housing accommodations is, after July first, nineteen hundred fifty-five, financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions or any agency thereof, provided that such a housing accommodation shall be deemed to be publicly assisted only during the life of such loan and guaranty or insurance, or (2) a commitment, issued by a government agency after July first, nineteen hundred fifty-five, is outstanding that acquisition of such housing accommodations may be financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions or any agency thereof.

§2. This act shall take effect July first, nineteen hundred fifty-five."

Appendix C.

N. Y. Exec. Law, Art. 15, §292, as supplemented by N. Y. Laws 1955, ch. 340, and amended by N. Y. Laws 1956, ch. 563.

"§292. **Definitions.**

"When used in this article:

* * * * *

"11. The term 'publicly-assisted housing accommodations' shall include all housing accommodations within the state of New York in

(a) public housing,

(b) housing operated by housing companies under the supervision of the commissioner of housing,

(c) housing constructed after July first, nineteen hundred fifty, within the state of New York

(1) which is exempt in whole or in part from taxes levied by the state or any of its political subdivisions,

(2) which is constructed on land sold below cost by the state or any of its political subdivisions or any agency thereof, pursuant to the federal housing act of nineteen hundred forty-nine,

(3) which is constructed in whole or in part on property acquired or assembled by the state or any of its political subdivisions or any agency thereof through the power of condemnation or otherwise for the purpose of such construction, or

(4) for the acquisition, construction, repair or maintenance of which the state or any of its political subdivisions or any agency thereof supplies funds or other financial assistance,

(d) housing which is located in a multiple dwelling, the acquisition, construction, rehabilitation, repair or maintenance of which is, after July first, nineteen hundred fifty-five, financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions or any agency thereof, provided that such a housing accommodation shall be deemed to be publicly assisted only during the life of such loan and such guaranty or insurance; and

(e) housing which is offered for sale by a person who owns or otherwise controls the sale of ten or more housing accommodations located on land that is contiguous (exclusive of public streets), if (1) the acquisition, construction, rehabilitation, repair or maintenance of such housing accommodation is, after July first, nineteen hundred fifty-five, financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions or any agency thereof, provided that such a housing accommodation shall be deemed to be publicly assisted only during the life of such loan and guaranty or insurance, or (2) a commitment, issued by a government agency after July first, nineteen hundred fifty-five, is outstanding that acquisition of such housing accommodations may be financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions or any agency thereof."

Appendix C.

REV. CODE WASH. §49.60.040, as amended by WASH. LAWS 1957, ch. 37.

"**§49.60.040. Definitions.** As used in this chapter:

* * * * * *

" 'Publicly-assisted housing' includes any building, structure or portion thereof which is used or occupied or is intended to be used or occupied as the home, residence or sleeping place of one or more persons, and the acquisition, construction, rehabilitation, repair or maintenance of which is financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions, or any agency thereof, provided that such a housing accommodation shall be deemed to be publicly-assisted only during the life of such loan and such guarantee or insurance, or if a commitment, issued by a government agency, is outstanding that the acquisition of such housing accommodations may be financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions, or any agency thereof; . . ."

Appendix D.

Memorandum Opinion.

IN THE

SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR KING COUNTY.

IN THE MATTER *of* The Appeal of JOHN J. O'MEARA and DONNA A. O'MEARA, his wife, Petitioners, *vs.* WASHINGTON STATE BOARD AGAINST DISCRIMINATION, Respondent, *and* ROBERT L. JONES, Complainant, *and* RAYMOND D. TORBENSON, ROBERT M. THATCHER, and SEATTLE REAL ESTATE BOARD, Additional Defendants.	No. 535996

The petitioner John J. O'Meara is a Commander in the United States Coast Guard. He and his wife own a single-family residence at 3004 East 70th Street, Seattle, Washington. In the early spring of this year, Commander

O'Meara received orders transferring him to Washington, D. C. He placed his Seattle home on the market by running an advertisement in the Seattle Times and by posting "For Sale" signs on his front lawn and at other places in the neighborhood. He did not list it for sale with any real estate broker as he intended to deal directly with prospective purchasers.

The complainant, Robert L. Jones, is a Negro, employed by the United States Postal Service. On Sunday, April 19th, Mr. and Mrs. Jones and some friends visited and inspected the O'Meara home. On Tuesday, April 21st, complainant's attorney went to the O'Meara home and left with Mrs. O'Meara a signed earnest money receipt contemplating a sale for $18,000, "all cash to seller on closing." The earnest money receipt was accompanied by a check for $1,000 as a down payment. These documents were left with Mrs. O'Meara over her protest. On April 22, they were returned to complainant's attorney by Commander O'Meara.

Mr. Jones lodged a complaint with the Washington State Board Against Discrimination, which followed the statutory administrative procedure by convening a hearing tribunal, which sat on Saturday, April 25th. The hearing consumed approximately eleven hours and the transcript of the testimony runs to 300 pages. Seven witnesses were heard. Thereafter, the hearing tribunal filed its opinion, findings of fact, and order. The hearing tribunal found, as a fact, that the O'Mearas had refused to sell their home to complainant because of his color, and that such refusal constituted an unfair practice as defined in RCW 49.60.217.

The home in question is approximately 24 years old. The O'Mearas bought it in 1955. It was financed through a private loan insured by the Federal Housing Administration, which hereafter in this opinion will be referred to as FHA. The law against discrimination under the authority of which the hearing tribunal sat, insofar as it applies to housing, was not enacted until 1957.

Memorandum Opinion.

For the purposes of this opinion, it will be assumed that the hearing tribunal was correct in finding that the O'Mearas had refused to sell their home to complainant because of his color. The law with which we are here concerned, so far as applicable here, reads as follows:

"Be it enacted by the Legislature of the State of Washington:

"Section 1. Section 1; chapter 183, Laws of 1949 and RCW 49.60.010 are each amended to read as follows:

"This chapter shall be known as the 'law against discrimination.' It is an exercise of the police power of the state for the protection of the public welfare, health and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, or national origin are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state. A state agency is herein created with powers with respect to elimination and prevention of discrimination in employment, in places of public resort, accommodation or amusement, and in publicly-assisted housing because of race, creed, color, or national origin; and the board established hereunder is hereby given general jurisdiction and power for such purposes.

• • •

"Section 3. Section 2, chapter 183, Laws of 1949 and RCW 49.60.030 are each amended to read as follows:

"The right to be free from discrimination because of race, creed, color, or national origin is recognized

as and declared to be a civil right. This right shall include, but not be limited to:

• • •

"(3) The right to secure publicly-assisted housing without discrimination.

• • •

"'Publicly-assisted housing' includes any building, structure or portion thereof which is used or occupied or is intended to be used or occupied as the home, residence or sleeping place of one or more persons, and the acquisition, construction, rehabilitation, repair or maintenance of which is financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions, or any agency thereof, provided that such a housing accommodation shall be deemed to be publicly-assisted only during the life of such loan and such guarantee or insurance, or if a commitment, issued by a government agency, is outstanding that the acquisition of such housing accommodations may be financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions, or any agency thereof:

• • •

"Section 15. There is added to chapter 183, Laws of 1949 and chapter 49.60 RCW, a new section to read as follows:

"It shall be an unfair practice:

"(1) For the owner of publicy-assisted housing to refuse to sell, rent, or lease to any person or persons such housing because of the race, creed, color, or national origin of such person or persons:"

Memorandum Opinion.

This court is fully cognizant of the evils which flow from discrimination because of race, creed, or color in a free democratic society. The practice of discrimination is utterly inconsistent with the political philosophy upon which our institutions are based and with the moral principles which we inherit from our Judeo-Christian tradition. Its effects, in terms of social, economic and psychological damage to the community, are well known. Segregated housing, in particular, is linked intimately with substandard, unhealthy, unsafe living conditions with resultant fire and health hazards. It undoubtedly contributes to instability in family life, moral laxity, and delinquency. It can and must be eliminated, not only in order that the members of our minority groups may reach their full potential but also in order that the majority may be brought to act in a manner consistent with the principles which they profess. It may be noted also that elimination of discrimination is necessary for the sake of America's relations with the rest of the world. Our standing with the so-called uncommitted peoples of the world suffers seriously because of the continued discrimination and segregation practiced in America.

In preparation for the hearing of this case, in addition to the legal authorities which have been cited by counsel and found by the court in independent research, the court has had the benefit of the following sociological material:

Report No. 37
Psychiatric Aspects of School Desegregation
Group for the Advancement of Psychiatry;

Where Shall We Live?
Report of the Commission on Race and Housing
University of California Press;

American Jewish Congress
Committee on Law and Social Action
The Sharkey-Brown Isaacs Bill;

The Negro Potential, Ginsberg;

Memorandum Opinion.

An American Dilemma, Gunnar Myrdal;

To Preserve These Rights
A Report of the President's Committee on Civil Rights;

The so-called Banner Report
A survey of community patterns conducted by the National Urban League for the Board of Directors of the Seattle Urban League;

The Testimony of James H. Scheuer from the Congressional Record of July 30, 1957;

Statements on the subject issued by various religious denominations as printed in Interracial News Service for January, February, March, and April, 1959;

A Statement of Principles and Objectives promulgated by the Administrative Board of the National Catholic Welfare Conference on November 14, 1958;

Prejudice and Your Child, Clark;

Racial and Cultural Minorities, Simpson-Yinger.

The Court is in agreement not only with the testimony adduced in this case, but with most of the foregoing listed material. However, sociology is not law.

We are faced here with a head-on collision between two rights, both of which historically have been regarded as basic, natural, inherent, and inalienable. One is the right of every individual to be treated equally, regardless of such irrelevant factors as race, creed, and color. The other is the right of the owner of private property to complete freedom of choice in selecting those with whom he will deal. This freedom of choice, as a legal conception, has been formalized as the principle of freedom of contract. It is

a classic instance of the irresistible force meeting the immovable object. The danger is that, in our zeal to protect and enforce the right to equality, we may seriously invade and curtail the right to freedom of contract.

Only three similar or analogous cases have been found. Two terminated at the trial court level and one was decided last week by an intermediate appellate court. Research has revealed no case decided by the court of last resort of any state.

New York State Commission Against Discrimination vs. *Pelham Hall Apartments, Inc., et al.,* is Index No. 8642 1957 in the Supreme Court of the State of New York for Westchester County. The Commission Against Discrimination had ordered the respondents not to discriminate in the leasing of apartments in alleged publicly-assisted housing. The respondents were the owners of a multiple-apartment dwelling. They refused to lease an apartment to one Shervington, a Negro. They admitted that their refusal was because of his race. The FHA commitment had been made on June 30, 1955 and the effective date of the New York statute was the following day, July 1st. It is to be noted that the New Yok statute is prospective only. It does not, as the Washington statute purports to do, apply to housing which was publicly assisted before its effective date. The bank advances which were made on account of the insured loan during construction of the project all came subsequent to the effective date of the act. It is to be noted also that the New York statute applies only to multiple dwellings or housing projects of ten or more contiguous houses. In the circumstances, the court had no difficulty in finding the respondents' property to be publicly assisted. On the constitutional question, the court recognized that the legislation could be justified only if it was determined that it was a valid exercise of the police power. It was held that the act was a valid exercise of the police power, and that its limitation to the specified classes of housing and to housing which became publicly assisted after

July 1st, 1955, was a reasonable classification or at least was not so arbitrary and unreasonable as to be in violation of the equal-protection clauses. Accordingly, the application of the Commission to enforce its order against the respondents was granted.

Ming vs. *Horgan, et al.*, is No. 97130 in the Superior Court of the State of California for Sacramento County. That case was not brought under the provisions of a state antidiscrimination law to compel the sale of property. It was a civil suit by a Negro for damages for refusal to sell him property, to-wit: a "tract home" in one after another of FHA and GI-insured subdivisions in the Sacramento area. There were fourteen named defendants and ten Doe defendants. The defendants were real estate sales agents and builder-subdividers. The homes had been constructed after FHA and GI commitments had been obtained. Since nine other members of the plaintiff's race had had similar experiences, plaintiff's was not an isolated experience or the result of mistake or personal antipathy. There thus appeared a pattern of conduct on the part of the builder-subdividers and real estate agents which revealed a settled policy, at least tacitly understood, that sales in new housing developments or subdivisions would not be made to Negroes. Upon these facts, plaintiff relied on a conspiracy theory. The court noted that the subdividers and builders, as well as the real estate brokers and salesmen, were all required to have state licenses to engage in their respective activities. The court stated that there is no legal restriction whatever (absent a statute) against an individual discriminating on the basis of color, race, creed, or any other characteristic in exercise of his freedom to contract. Whatever legal restriction exists is a restriction on government. It recognized that the case involved no appropriation of money and no subsidy, and that the powers of government were exercised merely by way of mortgage insurance guaranty, inspection services, and other administrative accompaniments. The court concluded that no conspiracy had

been established, and that the defendants had acted in the honest belief that to sell to a Negro would be the introduction into a white neighborhood of an inharmonious element not consistent with the obligation the defendants had to others to whom they had sold or hoped to sell and would be detrimental to the property values in the subdivision. It was concluded that the plaintiff had established a violation of his rights and he was allowed nominal damages.

Levitt & Sons, Inc. vs. *Division Against Discrimination* is No. A-334-58 in the Appellate Division of the Superior Court of New Jersey, decided July 22, 1959. In that case, the plaintiff appellant was the developer of approximately 16,000 one-family houses in a project known as Levittown. Its coplaintiff, Greenfield's Farm, Inc., was the developer of approximately 600 houses in Greenfield's Village. The FHA had committed itself to insure mortgages made by purchasers. It was necessary for FHA to approve the site and to lay down requirements concerning drainage, street layouts, parks, curbs, sidewalks, utilities, including water and sewage disposal, and such improvements as top soil, streets, trees, driveways, entrance walks, finish grade, etc. Individual applications were processed by the architectural valuation and mortgage credit sections in the Chief Underwriter's Office. During the course of the construction, FHA inspectors made periodic inspections. In fact, at Levittown a full-time FHA inspector was employed. The court concluded that the plaintiffs would not have undertaken the developments if they had not been assured of the availability of FHA financing and, accordingly, in view of the large scale and intimate connection of FHA with the developments, the court had no difficulty in concluding that they were "publicly assisted."

Prior to the *Pelham* case, *supra*, and prior to the effective date of the New York antidiscrimination law, the New York Court of Appeals decided the case of *Dorsey* vs. *Stuyvesant Town Corporation* (1949), 299 N. Y. 512, 87

N. E. (2d) 541. In that case, the respondent was a redevelopment company which had refused to lease an apartment to a Negro, who thereupon sought an injunction. The respondent had acquired its land and a tax subsidy through agencies of New York City, as well as the state, but the housing was erected with private funds. The court there held that the public assistance which the respondent had received was not sufficient to bring it within the constitutional inhibitions. The court, in effect, invited the legislature to fill the gap and the legislature subsequently did.

The state here, in order to prevail, must demonstrate that the complainant Jones lies within the ambit of the equal-protection clause of the 14th Amendment to the United States Constitution, which is "an explicit safeguard of prohibited unfairness." *Bolling* vs. *Sharpe*, 347 U. S. 497 (1954). However, the 14th Amendment proscribes only *state* action. Individual invasion of individual rights is not the subject matter of the 14th Amendment. Civil Rights Cases, 109 U. S. 3 (1883). However, in recent years the courts have greatly broadened the concept of state action, and have found a variety of activities to be such. In order to reach that conclusion, the courts have to find that the individuals concerned have conducted themselves by, for, or as the state. In order to be constitutional, the act in question must satisfy the notion of "state action." Insofar as the landowner is acting by, for, or as the state, the 14th Amendment is applicable, and insofar as he is acting in his private capacity, it does not apply.

In *Shelley* vs. *Kraemer*, 334 U. S. 1 (1948), the court held that restrictive covenants in deeds were not enforceable, that is, the aid of the state could not be invoked through the courts to enforce such covenants. However, the court recognized that voluntary enforcement or observance of such covenants did not violate a constitutional right. Here again the distinction between the state action and private action was recognized. The *Dorsey* case, *supra*, was decided one year later.

Memorandum Opinion.

An act of the state legislature is entitled to a presumption of constitutionality. The burden is on the challenger to establish that the statute exceeds the power of the legislature and, unless there is a clear conflict with the constitution, the act must be upheld: *Gruen* vs. *State Tax Commission*, 35 Wn. (2d) 1, 211 P. (2d) 651 (1949); *Port of Tacoma* vs. *Parosa*, 52 Wn. (2d) 181, 324 P. (2d) 438 (1958). The court cannot substitute its own judgment for that of the legislature as to the wisdom, expediency, or propriety of legislation. The legislative and judicial branches of the government are independent and coordinate. The court cannot set itself up as a super legislature. In the exercise of the police power, the legislature may enact any law to protect the health, safety, morals, and welfare of the people. Necessarily, the police power is an elastic concept. Its reach must become longer as our society becomes more complicated. The only limitation is that the end which is sought to be attained shall be accomplished by methods consistent with due process. This simply means that the law must not be unreasonable, arbitrary, or capricious, and that the means selected to accomplish the desired result shall have a real and substantial relation to the object sought to be attained. *Nebbia* vs. *New York*, 291 U. S. 502 (1934); *United States* vs. *Carolene Products Co.*, 304 U. S. 144 (1938). Statutes are not to be declared unconstitutional merely because they may tend to cut down the property rights of certain private property owners and may result in some financial loss to them without provision for compensation therefor. *Block* vs. *Hirsch*, 256 U. S. 135; 16 C. J. S. 1054-1058. However, it must not be forgotten that the right of private property is a fundamental, natural, and inalienable right guaranteed by the Federal and state constitutions. 16 C. J. S. 1048, *et seq.* One of the purposes for which our government was founded was to protect individuals in the enjoyment of private property, and one of the incidents of ownership has always been the right freely to choose those with whom the owner will deal.

Memorandum Opinion.

It may be that the *Pelham*, *Horgan*, and *Levitt* cases were correctly decided. A plausible argument can be made to the effect that one who obtains an FHA commitment prior to construction of a mass housing development and thereafter avails himself of all of the FHA's administrative machinery, including approval of the plans and inspection during construction, thereby becomes so intimately identified with government as to become affected with a public interest. It can be argued that such people become, to coin a phrase, persons of public accommodation. Land developers, builders of subdivisions, and real estate agents hold themselves out to the public as being prepared to provide wholesale housing for the masses, but the individual owner of a single private home presents an entirely different problem. Accordingly, the New York, California, and New Jersey cases are not here persuasive. Those cases all involve houses which had not become anyone's home at the time of FHA commitment. In fact, they had not even been constructed, and it can well be argued that, as a matter of social policy, thoroughly integrated housing should first be brought about in such new developments because there it can be accomplished at the outset without disturbing established patterns.

In addition to the authorities cited elsewhere in this opinion, the court has read the following:

Pound, "Liberty of Contract," 18 Yale Law Journal 454;

Jacobson, "Federalism and Property Rights," 15 New York University Law Quarterly 319;

Witherwax, "Antidiscrimination Legislation As It Affects Real Property Rights," 23 Albany Law Review 75;

McNeill, "Is There a Civil Right to Housing Accommodations?" 33 Notre Dame Lawyer 463;

Fisher and Greenberg, "The New Jersey Housing Anti-Bias Law: Applicability to Non-State-Aided Developments," 12 Rutgers Law Review 557;

Walch, Note on Recent Legislation, 56 Michigan Law Review 1223;

P. G. A. and M. C. G., "Racial Discrimination in Housing," 107 Pennsylvania Law Review 515.

This court concludes that it is palpable sophistry to argue that Commander O'Meara, in endeavoring to sell his home, is acting by, for, or as the state. A private individual acting in his private capacity is perfectly free to discriminate as he pleases. The alchemy by which his conduct may be transmuted into state action is too subtle for this court to understand. The mere existence of an FHA insured mortgage on his house is far too tenuous a thread upon which to hand such a drastic invasion of his constitutional right to do as he pleases with his own property. The thumb of government rests too lightly upon the scales. It may very well be that, if the FHA itself had had a regulation, at the time he obtained his loan, declaring that those who took advantage of FHA benefits would thereby be prohibited from discriminating in the eventual sale of the property, such regulation would be valid and binding. He would then have had the choice of accepting FHA financing with such limitation, or obtaining private financing without FHA. In this case, the house was built long before there was any FHA, and Commander O'Meara obtained his loan two years before the effective date of the antidiscrimination law. In the circumstances, it can hardly be argued that he voluntarily assumed any limitations at the time he obtained his loan. The court concludes, therefore, that, as applied to Commander O'Meara and others similarly situated, the act is unconstitutional and void as in violation of the 14th Amendment to the United States Constitution.

Memorandum Opinion.

One further question remains: Is the classification created by the act reasonable? It applies only to "publicly-assisted" property.

Mr. Justice Holmes, in *Patsone* vs. *Pennsylvania*, 232 U. S. 138 (1914), had the following to say on the subject:

> "We start with the general consideration that a State may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. . . . It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named. . . . The question therefore narrows itself to whether this court can say that the (legislature) was not warranted in assuming as its premise for the law that (the class which the law singles out was) the peculiar source of the evil that it desired to prevent."

There is no reason to suppose that persons with FHA mortgages on their homes are more likely to discriminate against minority groups than those who have conventional mortgages or no mortgages, or those who are purchasing upon contract. This act would prohibit Commander O'Meara from doing what his neighbors are at perfect liberty to do. It gives to those who have conventional mortgages, or no mortgages, and those who are buying upon contract, special privileges and immunities which are not accorded to him. The classification is arbitrary and capricious and bears no reasonable relation to the evil which is sought to be eliminated. It not only violates the equal protection clause of the 14th Amendment to the United States Constitution, but violates the special privileges and immunities clause of Article I, Section 12, of the Washington State Constitution.

To uphold the act here in question by extending the state-action theory to the present set of facts would so seriously strain the already severely-tested concept of private property as to leave little of it standing. This court does not believe that we have yet reached that stage in our social evolution which would permit any such holding.

Accordingly, the order of the hearing tribunal of the State Board Against Discrimination is held to be null and void, and is hereby set aside. An appropriate order may be presented.

Dated at Seattle, this 31st day of July, 1959.

JAMES W. HODSON,
Judge.

FILE COPY

No. 865.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

LEVITT AND SONS, INCORPORATED,
Appellant,

vs.

DIVISION AGAINST DISCRIMINATION IN THE STATE DEPARTMENT OF EDUCATION, WILLIE R. JAMES and FRANKLIN D. TODD,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

MOTION OF APPELLEES WILLIE R. JAMES AND FRANKLIN D. TODD TO DISMISS.

JEROME C. EISENBERG,
744 Broad Street,
Newark 2, New Jersey,
AND
HERBERT H. TATE,
126 Court Street,
Newark 3, New Jersey,
Attorneys for Appellee, Franklin D. Todd.

EMERSON L. DARNELL,
219 High Street,
Mount Holly, New Jersey,
AND
SIDNEY REITMAN,
24 Commerce Street,
Newark 2, New Jersey,
Attorneys for Appellee, Willie R. James.

JULIUS WILDSTEIN,
17 Academy Street,
Newark 2, New Jersey,
Of Counsel.

On the Brief:
JULIUS WILDSTEIN,
JOSEPH B. ROBISON,
RUTH BLUMROSEN.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark 5, N. J.—MArket 3-4974

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IN THE

Supreme Court of the United States

OCTOBER TERM 1959.

No. 865.

LEVITT AND SONS, INCORPORATED,

Appellant,

v.

DIVISION AGAINST DISCRIMINATION IN THE STATE DEPARTMENT OF EDUCATION, WILLIE R. JAMES AND FRANKLIN D. TODD,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

MOTION OF APPELLEES JAMES AND TODD TO DISMISS.

The individual appellees in the above entitled case, Willie R. James and Franklin D. Todd, move to dismiss the appeal on the grounds that the questions presented do not raise a substantial federal question, and that the second of the two questions presented was not timely or properly raised or expressly passed on in the court below.

Statute Involved.

The New Jersey statute upheld by the Supreme Court of New Jersey is the "Law Against Discrimination" (New Jersey Revised Statutes 18:25-1 *et seq.*), the relevant portions of which are set forth at pages 3 to 4 of the Jurisdictional Statement.

Questions Presented.

1. Does the New Jersey Law Against Discrimination, as applied to appellant because of its participation in the federal program of mortgage insurance, violate Article VI, Clause 2 of the United States Constitution by placing local restrictions upon a national program adopted by Congress, by conflicting with Congressional policy or by imposing requirements on a Federal agency subject to federal constitutional standards?

2. Is the provision in the New Jersey Law Against Discrimination prohibiting discrimination by the owner of a "publicly assisted housing accommodation" so lacking in standards by which the identity of the persons subject to the provisions of that statute can be determined as to violate the Due Process Clause of the Fourteenth Amendment?

Statement.[1]

Appellant announced in June, 1958, that its new 16,000-home project in Levittown Township (formerly known as Willingboro Township) New Jersey, would be an all-white community. Appellant thereafter denied the individual appellees, Willie R. James and Franklin D. Todd, who are Negroes, opportunity to buy homes in the project because of their race. They thereupon filed charges of discrimination by appellant with the Division Against Discrimination of the New Jersey Department of Education, which administers the State "Law Against Discrimination". Section 4 of that law, *inter alia*, prohibits discrimination based on race, creed, color, or national origin in housing receiving public assistance.

While the Division was investigating these complaints, appellant initiated this suit to enjoin proceedings by the Division under the statute. Appellant claimed that its housing project did not fall within the terms of the statute, that the law contained no effective enforcement provisions, and that, if the law was applicable to appellant, it was unconstitutional. These claims were rejected by the Appellate Division of the Superior Court and by the Supreme Court of New Jersey. (The history of the litigation is set forth in detail at pages 7 to 10 of the Jurisdictional Statement.) The principal points urged by appellant in the lower courts were matters of statutory interpretation and jurisdiction which appellant admittedly cannot and has not raised in this Court.

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[1] References to pages of the Appendix attached to the Jurisdictional Statement will be indicated by "(App. ....a)."

The individual appellees submit that neither of the two constitutional questions presented by appellant in its Jurisdictional Statement (page 5) is substantial and that, in addition, appellant failed to present properly to the court below the second of the two questions on which it here relies.[2]

[2] We do not suggest that this appeal should be dismissed because the order of the court below is not final, within the meaning of 28 U. S. C. § 1257, even though the court held that "the relief sought by plaintiffs [including appellant] in their action in lieu of prerogative writs cannot be granted, and the cause must be returned to the Division Against Discrimination in the State Department of Education for disposition" (App. 21a). We believe the order is final.

In the first place, the order is unquestionably final as to the proceeding instituted by appellant to restrain the Division. The court below having held that that relief "cannot be granted," nothing remains to be done in that proceeding. See *Madruga* v. *Superior Court*, 346 U. S. 556, 557, n. 1 (1954); *Bandini Petroleum Co.* v. *Superior Court*, 284 U. S. 8, 14 (1931); *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 566 (1947).

In the second place, the need for further proceedings before the Division has been obviated by a stipulation entered into by all the parties while the case was before the court below. The terms of the stipulation, which is on file with the Division Against Discrimination, are set forth in the *Appendix* to this Motion. That stipulation provides that, upon a finding by the court below that the Law applies to appellant, and upon issuance of that court's mandate (which has not yet occurred), the Division shall issue an order against appellant in the precise terms set forth in the stipulation, which order shall be enforceable in the state courts without notice to appellant. This consent order leaves nothing but ministerial action for the Division and the courts. The purpose of the stipulation, of course, was to permit the litigation to end when appellant's challenge to the statute was disposed of. Under these circumstances, the decision of the Court below is final. See *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69, 73 (1946); *Gulf Refining Co.* v. *United States*, 269 U. S. 125, 136 (1925).

ARGUMENT.

POINT I.

Appellant has not properly raised its claim of "indefiniteness" for review by this Court.

Appellant asserts jurisdiction in this Court under 28 U. S. C. Sec. 1257(2), which permits an appeal from a state court which has sustained the validity of a state statute where the validity of the statute has been "drawn in question" on the ground of repugnance to the United States Constitution.[3] This Court is "without jurisdiction" to consider such questions unless they are properly presented to the lower court: *Congress of Industrial Organization* v. *McAdory*, 325 U. S. 472, 477 (1945) and cases there cited. We submit that the second of appellant's two questions, con-

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[3] Appellant asks in the alternative for review of the decision below by writ of certiorari under 28 U. S. C. Secs. 1257(3) and 2103 (Jurisdictional Statement, p. 3). Apparently in support of this prayer, it suggests that there is a conflict in lower court decisions on the questions here presented (Jurisdictional Statement, p. 25). In fact, however, none of the cited cases dealt with the two narrow issues here raised—federal supremacy and vagueness. Thus, the decision in *O'Meara* v. *Washington State Board* (unreported), which appellant has included in its appendix (App. 48a to 62a), invalidated the Washington statute against discrimination in publicly assisted housing on two grounds, deprivation of property without due process and unreasonable classification. Neither of these grounds is presented here.

It should also be noted that the constitutional question regarding indefiniteness is not one that can be expected to arise under other state anti-discrimination laws. It arises in this case only because of the wording of the New Jersey statute. (See Jurisdictional Statement, p. 19.) We submit that for these reasons, as well as the arguments given above in support of the motion to dismiss the appeal, this Court should not grant a writ of certiorari herein.

cerning the alleged indefiniteness of the statute, was not properly presented below and is therefore not before this Court.

1. Appellant did not raise this question in the court below until it filed its petition for rehearing and it was not passed on by that court (see Jurisdictional Statement, pp. 10-11). Appellant recognizes that, since the court below did not entertain the petition for rehearing and pass upon the point, it cannot urge this point here,[4] unless it can be treated as a "surprise" issue. Accordingly, it claims that the question of indefiniteness entered the case only because of an interpretation of the statute in question by the court below which "Levitt could not reasonably have anticipated" (Jurisdictional Statement, p. 10). That is plainly not so.

The interpretation that appellant now describes as unexpected and unanticipated is that Section 4 of the New Jersey Law Against Discrimination bars discrimination in any housing that comes within the natural meaning of the term, "publicly assisted housing accommodation," as used in that Section, as that meaning is illustrated by the non-exclusive example given in Section 5k (App. 10a-12a). As we shall show, the broad interpretation of Section 4 was urged in the intermediate appellate court (the Appellate Division of the Superior Court), and was adopted by it. In the state Supreme Court, both the Division Against Discrimination and the individual appellees urged the broad interpretation in clear terms. Appellant clearly understood that argument and opposed it on various non-

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[4] *Corkran Oil Company* v. *Arnaudet*, 199 U. S. 182, 193 (1905); *Godschaux Co.* v. *Estopinal*, 251 U. S. 179, 181, 182 (1919) and cases cited therein.

constitutional grounds. Thus, it had ample warning that the court below might rule as it did.

2. When this case was in the Appellate Division, the appellees expressly urged, as that court noted in its opinion: "That in any event, the statute covers all 'publicly assisted housing,' and therefore includes any housing which has received material assistance in any way by operations or services of FHA" (App. 32a). The Appellate Division sustained this argument, saying (App. 32a-33a):

> "We hold that plaintiffs' contention that the housing in question is not 'publicly assisted housing accommodations' within the meaning of N. J. S. A. 18:25-4 is without merit. To hold otherwise would require us to ignore the large scale operation of FHA in connection with plaintiffs' developments, the details of which have been above outlined."

3. When the Appellate Division's decision was appealed to the court below, the parties continued to urge the broad interpretation of Section 4. The first reference to Section 4 in the argument portion of the brief filed by the Attorney General on behalf of the Division in the state Supreme Court described Section 4 as establishing "the right to obtain '*all* the accommodations, advantages, facilities and privileges of *any* • • • publicly assisted housing accommodation'" (Division brief, p. 14) (emphasis supplied in original brief). The brief of the Attorney General then devoted *six* pages to an argument under the heading: "The New Jersey Law covers all housing which is publicly assisted" (p. 16). After reviewing the evidence, it argued that "the assistance rendered directly by FHA to the developments here involved brought them clearly within the

literal and the common sense orbit of the term 'publicly assisted' as used in the Law Against Discrimination" (p. 20). The further argument was then made that the Legislature used the term of art, "include," in Section 5k in order to keep Section 5k from being restrictive (p. 21). This portion of the Attorney General's brief concluded:

> "The public assistance rendered directly to the builders during every stage of developing the houses is clearly encompassed within the Law Against Discrimination" (p. 22).

Similarly, the relevant portions of the argument in the Joint Brief For All Individual Defendants-Respondents (appellees here) started with the statement:

> "Section 4 of the Law Against Discrimination, as amended in 1957, establishes a civil right not to be discriminated against in a 'publicly assisted housing accommodation.' This, we contend, means that a housing accommodation is covered by the Act if it is shown to be publicly assisted" (p. 21).

In this same brief (p. 23) appellees urged that:

> "The use of the word 'include' in section 5k necessarily implies that the term being defined, 'a publicly assisted housing accommodation,' is *not limited* to the particular examples which are specified. It was so held in the case of State *v.* Rosecliff Realty Co. * * *. So here, the general term 'publicly assisted housing accommodation' must be 'construed fairly and justly' (R. S. Cum. Supp. 18:25-27), so as to include within its application all housing which may reasonably be held to have received substantial public assistance in any form." (Emphasis supplied in original brief.)

Later in this same brief (p. 51), in the discussion of appellant's contention (not raised in this Court) that the statute arbitrarily included some types of publicly assisted housing but excluded others, one of the answering arguments was:

> "Indeed, as we have demonstrated under Points I to IV, inclusive, of this brief, both the 1957 Amendment to the Law Against Discrimination as well as the enforcement provisions of section 9.1 cover all publicly assisted housing, and the enumeration of statutes in section 5k is not all-inclusive."

Appellant clearly understood the nature of these arguments. Thus, in its main brief filed in the court below, it referred to the Division's assumption "that the legislative intent was to include all housing as to which there was any public assistance" (pp. 23-24). It described the Division as arguing that " 'publicly assisted housing accommodation' is not in any way limited to the definition in N. J. S. A. 18:25-5(k)" (p. 24), and then continued to argue that the Legislature did not intend such broad coverage (pp. 24-25).

Plainly, appellant had ample opportunity at that point to urge that, if this interpretation were accepted, it would make the statute unconstitutional. Instead, it confined itself to arguments concerning statutory construction and legislative intent.

4. On this record, appellant cannot claim that the decision of the court below introduced a new and unexpected constitutional issue. This Court has declared that the test, in considering a claimed "surprise" issue, is "whether the ruling • • • assailed should have been anticipated." *Hern-*

don v. *Georgia*, 295 U. S. 441, 444 (1935). This Court held in that case that a litigant is bound to anticipate statutory interpretations suggested by prior rulings of the state court in other cases. In the case at bar, the ruling claimed as a surprise was made by a lower court *in the same case* and was explicitly urged by the parties in the court below.[5]

We respectfully submit, therefore, that this Court is without jurisdiction to consider the second question set forth by appellant in its Jurisdictional Statement.

POINT II.

The Law Against Discrimination does not violate Article VI, Clause 2 of the United States Constitution.

Appellant's argument that the New Jersey Law Against Discrimination violates the Supremacy Clause is refuted by those decisions of this Court "which enjoin seeking out conflicts between state and federal regulation where none clearly exists." *Huron Portland Cement Co.* v. *Detroit*, decided April 25, 1960, 28 U. S. L. W. 4269, 4271.

1. This part of appellant's argument rests on an obviously unsound and mistaken factual assumption—that "Congressional failure to adopt anti-discrimination provisions in enacting the various FHA laws indicates a *Congressional policy not to have such limitations imposed*" (Jurisdictional Statement, p. 13) (emphasis supplied).

Undoubtedly, Congress has made a conscious decision not to apply a non-discrimination clause to federally-

[5] Even if the Appellate Division had not ruled on this issue, appellant would still have been on notice that it was in the case. *Godschaux Co.* v. *Estopinal*, *supra*.

assisted housing that would operate in all the states of the Union. In view of the "mixed motives" that prompted this decision (Comment, 59 Colum. L. Rev. 782, 784, n. 19 (1959)), it cannot possibly be distorted into a policy of *forbidding* application to FHA housing of the non-discrimination laws of individual states.

If this argument were sustained, all of the various state and local laws barring discrimination in housing generally or in housing receiving public assistance would be invalidated, at least in part.[6] Nor would this stop with housing. Presumably, under appellant's logic, state fair employment laws may not constitutionally apply to Federal contractors. State laws against discrimination in colleges and universities may not apply to institutions receiving federal grants.

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[6] (a) *State laws barring discrimination in general housing:* Colorado—House Bill No. 259, Approved April 10, 1959; Connecticut—Gen. Stats. Conn., Secs. 53-35, 53-36, and 31-122 through 31-128; Massachusetts—Anno. L. Mass., Supp., Ch. 151 B, Secs. 1 through 10; Oregon—Ore. Rev. Stat., Secs. 659.010 through 659.110.

(b) *State laws barring discrimination in publicly assisted housing:* California—Health and Safety Code Cal., Secs. 33049 and 35700 through 35740; Minnesota—Minn. Stats. Ann., Secs. 462.481, 462.525, and 462.641; New Jersey—N. J. Revised Statutes, 18:25-1 through 18:25-28; New York—Executive Law (McKinney), Secs. 290 through 301; Washington—Rev. Code Wash., Secs. 49.60.010 through 49.60.310, as amended L. 1957, Ch. 37.

(c) *Local ordinances and resolutions:* These are collected in the federal Housing and Home Finance Agency's 60-page report: "Nondiscrimination Statutes, Ordinances, and Resolutions Relating to Public and Private Housing and Urban Renewal Operations," revised October 1958. See especially the broad New York City ordinance set forth at pages 44-46 of the study. Since then Pittsburgh, Pa. has adopted a similar ordinance. Ordinance approved December 15, 1958, supplementing Ordinance No. 237, approved June 25, 1955.

Could anyone argue that the Housing Act would have been adopted if it had contained a clause expressly invalidating state anti-discrimination laws? Yet that is what appellant contends that Congress, in fact, did.[7]

2. "Evenhanded local regulation to effectuate a legitimate local public interest," such as this Court has just sustained (*Huron* case *supra*, 28 U. S. L. W. at 4270), is all that is involved here. This Court "has long insisted that an 'intention of Congress to exclude states from exerting their police power must be clearly manifested.'" *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, 749 (1942), citing many cases. We submit that the regulation here involved is clearly sustainable under the guidelines established by numerous decisions of this Court.[8]

The cases cited by appellant at pp. 15-16 of the Jurisdictional Statement provide no authority for its extreme claims. Each of them struck down state laws which impaired the functioning of a federal program. Thus, the

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[7] Appellant's reliance (Jurisdictional Statement pp. 13-14) on *Dorsey* v. *Stuyvesant Town Corp.*, 299 N. Y. 512 (1949), cert. den. 339 U. S. 981 (1950) is entirely misplaced. That case held that the New York legislature had not barred discrimination, not that it could not. Far from guaranteeing those who built under the statute a right to discriminate, the court specifically said that "political processes [i.e., appeals to the legislature] must furnish the appropriate means for extension of those rights in areas wherein they have not been heretofore asserted" (299 N. Y. at 534).

[8] See for example: *Alabama* v. *King & Boozer*, 314 U. S. 1 (1941); *Penn Dairies* v. *Milk Control Commission*, 318 U. S. 261 (1943); *James Stewart & Co.* v. *Sadrakula*, 309 U. S. 94 (1940); *Hendrick* v. *Maryland*, 235 U. S. 610 (1915); *Esso Standard Oil Co.* v. *Evans*, 345 U. S. 495 (1953); *Smith* v. *Davis*, 323 U. S. 111 (1944); *James* v. *Dravo Contracting Co.*, 302 U. S. 134 (1937).

state statute condemned in *Miller* v. *Arkansas*, 352 U. S. 187 (1956), was found by this Court to "frustrate the expressed federal policy of selecting the lowest responsible bidder" (352 U. S. at 190). In *Public Utilities Commission* v. *United States*, 355 U. S. 534, 540 (1958), "a comprehensive policy governing procurement" was found to be jeopardized by the state law.

3. Two decisions of this Court show that it is extremely difficult to twist a state ban of racial discrimination into an impediment to federal policy. In *Railway Mail Association* v. *Corsi*, 326 U. S. 88 (1945), this Court upheld application of a New York statute barring racial discrimination by labor unions to an organization of post office employees. The statute was found valid even though it "inevitably imposes some burdens on those dealing with the national government of the same kinds as those imposed on others" (326 U. S. at 95). The union, the Court concluded, had failed to show "an intent on the part of Congress to enter and completely absorb the field of regulation of organizations of federal employees." *Id.* at 97. In *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28 (1948), which was cited with approval in the *Huron* case, *supra* (28 U. S. L. W. at 4271), this Court rejected a claim that the Michigan law prohibiting discrimination by public carriers could not apply to a ship traveling in foreign commerce. This Court said (333 U. S. at 37): "The regulation in this application contains nothing out of harmony, much less inconsistent with our federal policy . . ." It added (333 U. S. at 40): "It is difficult to imagine what national interest or policy . . . could reasonably be found to be adversely affected by applying Michigan's statute to these facts or to outweigh her interest in doing so."

4. Appellant's argument that the Law Against Discrimination places restraints on the FHA rests on its asserted premise that "the statute has the effect of prohibiting FHA from insuring mortgage loans in New Jersey on housing unless sold in compliance with the New Jersey statute" (Jurisdictional Statement, p. 16). But the Law Against Discrimination does not regulate the FHA but the builders who use the FHA facilities. It does not impinge upon FHA operations any more than do the building codes and safety laws that govern the operations of all builders. These regulations, although they vary from state to state and even from locality to locality, have not introduced any insuperable difficulties in the administration of the FHA program. The cases cited above (in the preceding paragraph and in footnote 8) clearly establish the validity of the application of such laws to FHA housing.

5. Far from plainly infringing upon Federal policy as required by the cases already cited, Section 4 of the Law Against Discrimination in fact materially promotes the very purposes for which the FHA was established. See Note, *The New Jersey Housing Anti-Bias Law*, 12 Rutgers L. Rev. 557, 570-573 (1958).[9] The "national housing policy" declared by Congress is aimed at "the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family * * *" 42 U. S. C. Sec. 1441. This in turn implements 42 U. S. C. Sec. 1982 which guarantees to all citizens the same right to purchase and hold property as is enjoyed by white citizens.

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[9] Similar support of Federal anti-discrimination policy was noted by this Court in the *Bob-Lo* case, *supra*, 333 U. S. at 37, n. 16.

Congressional intent in enacting the Federal housing program was from its beginning primarily to expand housing facilities for the use of veterans, defense workers and persons of low income and moderate means.[10] Plainly this means *all* veterans, defense workers and persons of low income.

It is clear that FHA does not find itself burdened by state laws against discrimination. It recognizes those laws as valid and as aiding fulfillment of the purposes embodied in the national housing program. FHA has encouraged the sale and rental of homes without discrimination.[11] With specific regard to state anti-discrimination laws, it is the policy of FHA to enter into cooperation agreements with state anti-discrimination agencies to further adherence to the laws they administer.[12] This policy is embodied in FHA forms 2004 (Exh. B, J118a)[13] and 2201-G (Exh. B, J120a), which call attention to the provisions of the Law Against Discrimination and warn that "you are expected to conduct your operations in conformity with the above laws."

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[10] See S. Rept. No. 1300, 75th Congress, 2d Sess. (1937), p. 20; 84 Cong. Rec. 1432 (1939); 93 Cong. Rec. 11401-11402 (1947); 95 Cong. Rec. 12079 (1949); S. Rept. No. 1472, 83rd Cong., 2d Sess. (1954), p. 2.

[11] See FHA Rules and Regulations, Mutual Mortgage Insurance, Sec. 221.29, Sec. 221.34; FHA Underwriting Manual (1949), Sec. 242; Statement of FHA Commissioner Norman P. Mason (now Housing and Home Financing Administrator) at hearing on "Civil Rights" before Sub-committee 5 of the House Judiciary Committee, March 13, 1959, 86th Cong., 1st Sess., pp 422-423.

[12] Statement of Mr. Mason cited in footnote 11, at p. 423; Report of the United States Commission on Civil Rights, pp. 465-467 (1959).

[13] These references are to the Joint Appendix for All Parties in the court below.

6. Finally, appellant argues that the Fifth Amendment imposes a requirement of non-discrimination on FHA and requires it, "in providing federal assistance to private builders, to impose a duty not to discriminate on a national basis" (Jurisdictional Statement, p. 17). This argument, of course, is at war with its previous argument (Jurisdictional Statement, p. 13) that Congress intended to allow FHA builders to discriminate. In any case, if the argument is valid, appellant is bound by the Fifth Amendment not to discriminate and is obviously not in a position to object to a New Jersey statute imposing the same obligation.

POINT III.

The Law Against Discrimination is not void for indefiniteness.

The court below found that the Law Against Discrimination applies to housing that falls within the natural meaning of the phrase, used in Section 4, "publicly assisted housing accommodations," as the meaning of that phrase is illuminated by the examples given in Section 5k (App. 9a-12a). Appellant contends that this interpretation of the statute makes it so vague as to render its application to appellant a violation of due process (Jurisdictional Statement, pp. 18-23). Assuming that this claim is properly before this Court (see Point I, *supra*) we submit that it raises no substantial question. The decisions of this Court leave no room for doubt that the phrase, "publicly assisted housing accommodation," is sufficiently precise, even standing by itself, to serve as a basis for administrative action and that this conclusion is reenforced by the illustrations given

in Section 5k and the legislative policy stated in Sections 2 and 3.

1. A statute may be void for vagueness if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States* v. *Harriss*, 347 U. S. 612, 617 (1954). This Court has made it plain that "the rule as to a definite standard of action is not so strict" where the challenge is based on "the delegation of legislative power to executive boards and officers." *Mahler* v. *Eby*, 264 U. S. 32, 41 (1924). Accord: *Boyce Motor Lines* v. *United States*, 342 U. S. 337, 340 (1952).

The reason for this is exemplified in the instant case: No builder of housing can be put in peril by any possible vagueness in the clause here challenged by appellant. No builder is subject to compulsion until the Division has determined that its operations are covered by the Act and has issued an order which has been enforced by a court, in a civil action for specific performance, after review of all the legal issues. See N. J. Revised Statutes 18:25-19.

2. The phrase, "publicly assisted housing accommodation," has a simple common sense meaning that provides entirely adequate guides for the administrative agency enforcing the law and for the courts. Indeed, it is far clearer than other phrases that have been sustained against constitutional attack for vagueness.

The applicable cases are summarized in *American Power & Light Co.* v. *Securities and Exchange Commission*, 329 U. S. 90, 104 (1946), where this Court upheld legislative provisions granting the S. E. C. power to act so as "to

ensure that the corporate structure or continued existence of any company in a particular holding company system does not '*unduly or unnecessarily complicate the structure*,' or '*unfairly or inequitably distribute voting power among security holders*' " of such holding-company system. (Emphasis supplied). This Court held (329 U. S. at 105):

> **"These standards are certainly no less definite in nature than those speaking in other contexts in terms of 'public interest,' 'just and reasonable rates,' 'unfair methods of competition' or 'relevant factors.' The approval which this Court has given in the past to those standards thus compels the sanctioning of the ones in issue." (Citing cases.)**

Subsequently this Court stressed that, even in criminal cases, the Constitution "does not require impossible standards" [*United States* v. *Petrillo*, 332 U. S. 1, 7 (1947)], or "the precision of mathematical symbols". *Boyce Motor Lines* v. *United States*, *supra*, 342 U. S. at 340.

In any case, neither the Division nor the reviewing courts need construe the language of Section 4 as it stands alone. They can turn to the legislative purpose and policy, as declared in Sections 2 and 3 of the law (N. J. Revised Statutes 18:25-2 and 3). As the court below noted, they can also "be mindful of the clear and positive policy of our State against discrimination as embodied in *N. J. Const.*, Art. I, par. 5" (App. 8a). Finally, they can and must follow the path of the court below in treating Section 5k as giving "illustrations of the meaning of the phrase being considered" (App. 10a, 12a-13a).

Even a criminal statute can withstand the suggestion of possible "marginal cases." *United States* v. *Petrillo*,

supra, 332 U. S. at 7. Common sense, as well as a reference to Section 5k, will quickly dispose of the "marginal cases" suggested by appellant (Jurisdictional Statement, pp. 19-20). In an administrative statute, as the cases above show, there is ample clarity in a phrase like "publicly assisted housing accommodation," which has a natural factual meaning and appears in a statutory context that provides clear guides for administrative judicial delineation. The reviewing courts, in turn, as the court below noted, need not decide in each case "what are the outer limits of the term" (App. 13a).

3. Appellant cites no authority for its strained due process argument except two cases involving pupil placement laws [*Orleans Parish School Board* v. *Bush*, 242 F. 2d 156 (5th Cir. 1957), cert. denied, 354 U. S. 921 (1957) and *Board of Supervisors of La. St. U. & A. & M. Col.* v. *Ludley*, 252 F. 2d 372 (5th Cir. 1958), cert. denied, 358 U. S. 819 (1958)] and one involving freedom of speech [*Burstyn* v. *Wilson*, 343 U. S. 495 (1952)].[14] These cases are easily distinguished.

It should be noted at the outset that all of these cases dealt with statutes appearing to limit basic democratic rights under the Constitution. Thus, in *Burstyn*, Justice Frankfurter, concurring, took care to point out that the effect of this vague statute was to "fetter the mind and put within unascertainable bounds the varieties of religious

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[14] The only other cases cited in this portion of the Jurisdictional Statement (pp. 18-23) [*Small Co.* v. *Am. Sugar Ref. Co.* 267 U. S. 233 (1925) and *Cline* v. *Frink Dairy Co.*, 274 U. S. 445 (1927)], are referred to by appellant only to support its point that the rule against vagueness applies to civil as well as criminal cases. They provide no authority for applying that rule to the clear terms of the New Jersey statute.

experience" (343 U. S. at 533). In *Winters* v. *New York*, 333 U. S. 507, 517 (1948), this Court stressed that the rule against vagueness is applied more strictly to statutes threatening "limitations on free expression."

Turning to the three cases cited by appellant, we find that in both *Orleans* and *Ludley*, state laws, permitting local school officials to determine or otherwise affect which schools pupils were to attend, provided either the unconstitutional standard of racial segregation or *no* standard at all. Viewed most favorably to appellant, these two cases merely hold that a statute that provides *no* standard for administrative action is invalid.[15]

In *Burstyn*, this Court found the term, "sacrilegious," too indefinite because: "Under such a standard the most careful and tolerant censor would find it virtually impossible to avoid favoring one religion over another, and he would be subject to an inevitable tendency to ban the expression of popular sentiments sacred to a religious minority" (343 U. S. at 505). No parallel threat to freedom of expression exists here. Furthermore, the statutory language here challenged certainly can be fixed in meaning far more readily that the term "sacrilegious."

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[15] Subsequent to these two cases, this Court affirmed, in a one-sentence opinion, a lower court decision upholding the Alabama pupil assignment law which does provide standards for the assignment process. *Shuttlesworth* v. *Birmingham Board of Education*, 162 F. Supp. 372 (1958), aff'd, 358 U. S. 101 (1958). Although the statute was not challenged on the ground that the standards it established were too vague, it is worth noting that they were certainly no clearer than the phrase here challenged. They included such terms as "the effect of the admission of new pupils upon established or proposed academic programs" and "the scholastic aptitude and relative intelligence or mental energy or ability of the pupil."

Conclusion.

For the foregoing reasons, the questions presented by appellant are clearly unsubstantial and one of the questions has not been properly raised and therefore this motion to dismiss should be granted.

Respectfully submitted,

JEROME C. EISENBERG
and
HERBERT H. TATE,
Attorneys for Appellee,
Franklin D. Todd.

EMERSON L. DARNELL
and
SIDNEY REITMAN.
Attorneys for Appellee,
Willie R. James.

JULIUS WILDSTEIN,
Of Counsel.

On the Brief:
JULIUS WILDSTEIN,
JOSEPH B. ROBISON,
RUTH BLUMROSEN.

May 11, 1960.

APPENDIX.

DIVISION AGAINST DISCRIMINATION
DEPARTMENT OF EDUCATION
STATE OF NEW JERSEY

Docket Nos. H3-12R, H3-13R.

WILLIE R. JAMES, and FRANKLIN D. TODD, Complainants, *vs.* LEVITT AND SONS, INCORPORATED, Respondent.	Stipulation

WHEREAS, an appeal is presently pending before the Supreme Court of New Jersey concerning these proceedings, Docket No. 2983, and the said Court has granted leave by Order dated November 2, 1959 to proceed before the Division Against Discrimination in these cases, concerning the allegations of racial discrimination made by the complainants, Dockets H3-12R, H3-13R.

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned attorneys for Levitt and Sons, Incorporated, and the attorneys for the complainants, Willie R. James and Franklin D. Todd, and the Attorney General of New Jersey, attorney for the Division Against Discrimination, as follows:

1. Levitt and Sons, Incorporated, for the purposes of these cases, only, waives its rights to a hearing and to the stating of findings of fact and to further proceedings in the Division Against Discrimination. In the event that the

Supreme Court of New Jersey enters judgment in the pending appeal in Docket No. 2983 on a determination that the Division Against Discrimination has jurisdiction with respect to the complaints of Willie R. James and Franklin D. Todd filed against Levitt and Sons, Incorporated, the Division Against Discrimination, upon the issuance of the mandate of the Supreme Court of New Jersey, shall enter an order, without further notice, providing as follows:

"Pursuant to the stipulation of the parties hereto, it is on this day of , 1960, Ordered that:

"(a) Levitt and Sons, Incorporated, their officers, agents, employees and assigns shall cease and desist from discriminating against all persons because of race, creed, color, national origin or ancestry in passing on applications for, in the sale of and in giving occupancy of its publicly assisted housing accommodations and equipment appurtenant thereto in Levittown, New Jersey;

"(b) Levitt and Sons, Incorporated, their officers, agents, employees and assigns shall issue notice of this Order and instructions for compliance therewith to all of its officers, agents, employees and assigns concerned in processing applications for and selling its publicly assisted housing accommodations in Levittown, New Jersey, and shall post notice of this Order in a room where it can be seen by its employees whose duties include taking applications for and selling its publicly assisted housing accommodations in Levittown, New Jersey;

"(c) Levitt and Sons, Incorporated, within one month from the date of the entry of this Order, shall, upon written request from Willie R. James and

Franklin D. Todd enter into a contract to sell them each a house in Levittown, New Jersey, to be selected by them, upon the same conditions and prerequisites and subject to the same financing and terms and arrangements as were applicable to all other purchasers of its publicly assisted housing accommodations in Levittown, New Jersey at the time of the filing of the complaints herein by Willie R. James and Franklin D. Todd;

"(d) Levitt and Sons, Incorporated, 45 days after the date of entry of this Order, shall report in writing to the Division Against Discrimination the action taken by it with respect to compliance with the provisions of paragraph (c) hereof, and shall make available to the Division Against Discrimination on reasonable request and during business hours its records concerning applications for and sales of its publicly assisted housing accommodations in Levittown, New Jersey, to enable the Division Against Discrimination to supervise compliance with the provisions of this Order."

2. The County Court or the Superior Court, or both, may, upon application of the Division Against Discrimination and without notice and hearing, enter an order compelling performance of the foregoing Order.

3. The execution of this stipulation does not constitute an admission by any of the parties hereto of the validity of the factual or legal issues herein asserted by the other.

4. Execution of this Stipulation does not constitute a waiver by Levitt and Sons, Incorporated, of the right to pursue, after issuance of the mandate of the New Jersey Supreme Court, whatever judicial remedies are available to it with respect to the issues of interpretation, construc-

tion and validity of the law against discrimination raised in the pending appeal in the New Jersey Supreme Court, nor a waiver by the Division Against Discrimination or the complainants of their right to contest such action.

DAVID D. FURMAN,
Attorney General of
New Jersey,
Attorney for Defendant-
Respondent, Division
Against Discrimination,
By: DAVID M. SATZ, JR.,
Deputy Attorney General.

JULIUS WILDSTEIN,
Of Counsel with All Individual
Defendants-Respondents.

PITNEY, HARDIN & WARD,
By: WILLIAM P. REISS,
A Member of the Firm,
Attorneys for Plaintiff-
Appellant, Levitt and Sons,
Incorporated.

KAPELSOHN, LERNER,
LEUCHTER & REITMAN,
By: SIDNEY REITMAN,
A Partner,

and

EMERSON L. DARNELL,
Attorneys for Defendant-
Respondent, Willie R. James.

HERBERT H. TATE

and

JEROME C. EISENBERG,
Attorneys for Defendant-
Respondent, Franklin D. Todd.

Dated: November 25, 1959.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 865

LEVITT AND SONS, INCORPORATED,
Appellant,

vs.

DIVISION AGAINST DISCRIMINATION IN THE STATE DEPARTMENT OF EDUCATION, WILLIE R. JAMES and FRANKLIN D. TODD,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

MOTION TO DISMISS ON BEHALF OF DIVISION AGAINST DISCRIMINATION, APPELLEE

DAVID D. FURMAN,
Attorney General of the State of New Jersey,
Attorney for Appellee, Division Against Discrimination,
State House Annex,
Trenton 25, New Jersey.

On the Brief:
LEE A. HOLLEY,
Deputy Attorney General.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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IN THE

Supreme Court of the United States

OCTOBER TERM 1959

No. 865

LEVITT AND SONS, INCORPORATED,

Appellant,

v.

DIVISION AGAINST DISCRIMINATION IN THE STATE DEPARTMENT OF EDUCATION, WILLIE R. JAMES AND FRANKLIN D. TODD,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

Motion to Dismiss

Pursuant to Rule 16, paragraphs 1(a) and 1(b), of the Revised Rules of this Court, the appellee, Division Against Discrimination, an agency within the Department of Education, State of New Jersey, moves to dismiss the appeal of Levitt and Sons, Incorporated, on the ground that such appeal is not from a final judgment or decree in the State proceedings and on the further grounds that the appellant does not present a substantial federal question; that the question concerning vagueness in violation of the Fourteenth Amendment was not properly raised before or passed upon by the Supreme Court of New Jersey, and that the appellant lacks standing to raise this question concerning the Due Process clause of the Fourteenth Amendment.

Statement

This is a Motion to Dismiss both an appeal allegedly within this Court's jurisdiction by reason of 28 U.S.C. §1257(2) and an alternative request for a writ of certiorari, by reason of 28 U.S.C. §2103. Levitt & Sons, Incorporated appeals a decision of the Supreme Court of New Jersey in a proceeding brought before that court as an appeal from an interlocutory order of a state administrative agency.

The Division Against Discrimination will rely in part upon the Statement of Facts and History of Litigation contained in the Jurisdictional Statement filed by Levitt with this Court on April 15, 1960, and received by the Division on April 18, 1960. It joins in the Motion to Dismiss, filed by the appellees, Willie R. James and Franklin D. Todd, on May 16, 1960. The Division will supplement the history of this litigation to the extent necessary for the purposes of its Motion to Dismiss.

The Supreme Court of New Jersey has resolved that under New Jersey law, N.J.S.A. 18:25-4, 5(k), Levitt is engaged in the business of building publicly assisted housing in Levittown, New Jersey (Jurisdictional Statement p. 13a). The Court found it immaterial whether or not Levitt received its moneys directly from the State or from the Federal government since it was materially assisted by the federal government through the FHA program. It also noted by way of dicta that there "is much persuasive force in the argument" that Levitt's housing was in fact "financed" by public assistance, thus bringing Levitt within the terms of the statutory definition. N.J.S.A. 18:25-5 (k). (Jurisdictional Statement p. 9a).

Because of the unique procedural history of the present case, it is necessary to review past proceedings in order to shed light on the question of the finality of the judgment

under review. There has never been a factual hearing upon the substantive issue of racial discrimination by Levitt nor has the Division had occasion to order specific "affirmative action" available to the complainants as a redress for their alleged wrongs suffered. N.J.S.A. 18:25-17.

The present litigation on appeal was initiated by James and Todtl by complaints filed with the Division against Levitt, claiming wrongful discriminatory treatment in the offerings for sale of publicly assisted housing in the summer of 1958. N.J.S.A. 18:25-13. The Division conducted and completed an investigation of the facts alleged in these complaints, terminating in an administrative finding of "probable cause". N.J.S.A. 18:25-14, which was not appealed. Cf. *Revised Rules of the Supreme Court of New Jersey*, 4:88-8(b). After this finding the present parties participated in conciliatory and persuasory proceedings in an attempt to dispose amicably of the controversy, N.J.S.A. 18:25-14; these attempts were of no avail. Levitt and the complainants were thereupon given notice of a public hearing which was to have been held, after an adjournment, on December 15, 1958. N.J.S.A. 18:25-15.

Three days prior to this scheduled hearing, Levitt commenced an action in the Law Division of the Superior Court in lieu of the extraordinary legal remedy of *certiorari*. *Revised Rules of the Supreme Court of New Jersey*, 4:88 *et seq.* In this proceeding it secured a temporary restraint against the agency hearings. The Law Division ultimately dismissed this action in lieu of prerogative writ on February 16, 1959, because of lack of jurisdiction under New Jersey law and because of Levitt's failure to exhaust administrative remedies (Appendix A-1).

Upon Levitt's appeal of the dismissal to the Appellate Division of the Superior Court, that court, in view of the issues raised as to the applicability and constitutionality

of the Law, on its own motion and with the consent of the parties, treated the Notice of Appeal as a Motion for Leave to Appeal an interlocutory order of an administrative agency, i.e., the order for public hearings by the Division. *Rules of Practice of the Supreme Court of New Jersey*, 1:27A-2(a) (1969 Edition) (Appendix A-2). The court decided to consider the stayed legal issues raised in the prerogative writ action on their merits and left no question in treating the matter as an interlocutory appeal, that the litigation before the court was to one first started in the Division. The court [illegible] by way of affirming the dismissal for [illegible] Division but failed to require that [illegible] administrative remedies before filing [illegible] legal questions. The sole action before the Court was, by way of interlocutory appeal, the controversy [illegible]. The Appellate Division remanded the case [illegible] agency for further proceedings on July 22, 1970 [illegible] the essential legal questions [illegible] (Supplemental Statement p. 39a).

After motions for [illegible] denied a rehearing before the Appellate Division, they appealed to the Supreme Court of New Jersey. The respondent Division moved: 1) to stay the consideration of the appeal because of its interlocutory nature and 2) to allow immediate administrative proceedings before the Division (Appendix B). The New Jersey Supreme Court granted the second portion of the motion but denied that it would consider the legal issues in the interlocutory appeal upon an accelerated time schedule (Appendix C).

While there has not been a hearing upon the substantive issue of racial discrimination, by Stipulation of the attorneys for [illegible] and individual appellees and the Attorney General of New Jersey for the Division,

(Motion to Dismiss by Individual Appellees p. 1a), the need for such hearing was obviated. However, this Stipulation did not purport to resolve finally the controversy over the specific remedy, if any, to be afforded the individual appellees. It was agreed that an Order was to be entered by the Division, in the event the New Jersey Supreme Court affirmed the decision of the Appellate Division, at the time the former court issued its mandate. *Revised Rules of the Supreme Court of New Jersey*, 1:2-1. This Order is to provide, *inter alia*, that Levitt sell each complainant a publicly assisted house in Levittown without racial discrimination, upon the same terms, conditions and financial arrangements as were utilized in the manner of 1958 (Motion to Dismiss by individual appellees pp. 2a-3a). Substantial jurisdiction was retained in the Division "to supervise compliance with the provisions" of the Order, since the terms thereof are phrased only generally and do not specify the particular formula for compliance. The Division in effect, has reserved the right to approve the manner of compliance chosen by Levitt.

After the New Jersey Supreme Court's decision upon the interlocutory appeal, Levitt's Notice of Appeal to the United States Supreme Court was filed on February 11, 1960, and the New Jersey court on its own motion withheld the issuance of its mandate on February 15, 1960, for sixty days (Appendix D). In April, 1960, that Court upon the motion of Levitt (Appendix D) again refrained from issuing the mandate until June 30, 1960 (Appendix F). Thus, the initial machinery provided for in the stipulated Order has not been put in motion and the substantial questions arising because of the limitation of the proposed Consent Order remain a real possibility.

POINT I

The present appeal should be dismissed as premature; the decision of the Supreme Court of New Jersey is not a final judgment or decree.

The individual appellees concede the finality of the judgment upon appeal. (Motion to Dismiss by individual appellees p. 4, fn. 2); the appellant avoids this question regarding the Court's jurisdiction, stating that the New Jersey Supreme Court "is the highest state court available" but not mentioning why for this litigation it is the last court available (Jurisdictional Statement, p. 1).

The Congressional limitations and this Court's own self abstaining practice in allowing an appeal from State litigation firmly established that there must be a final judgment or decree. 28 U.S.C., 1257. Concerning another State administrative proceeding, *Republic Natural Gas Co. v. Oklahoma*, 334 U. S. 62; 68 S. Ct. 972; 92 L. Ed. 1212 (1948), Mr. Justice FRANKFURTER stated in this regard:

> "Close observations of this limitation upon the Court is not required for a strangling technicality. History bears ample testimony that it is an important factor in securing harmonious State-federal relations." 334 U. S. at 67.

The Division believes that the present litigation falls directly in line with the theory and principles of the *Republic* decision and cases cited therein concerning the lack of requisite finality to justify review of State litigation.

The Division has retained substantial jurisdiction to supervise compliance with the general plan agreed upon by the parties as a means of terminating the controversy. This retention was necessary and involved by no means ministerial duties, as was also the case in the jurisdiction

retained by the State agency in the order of the Oklahoma Corporation Commission. 334 U. S. at 66. Because the present Consent Order does not purport to define specifically or particularize the manner and means of compliance, this controversy is potentially incomplete. Until the parties have agreed upon the precise avenue of compliance that will be utilized with the approval of the Division, or the Division has interceded to settle any question that may arise (and perhaps even order a specific mode of compliance), a real possibility exists of further controversy giving rise to the consequent danger of more federal questions in this litigation.

In State administration proceedings, even though the major issues of the existence of liability or the status of a litigant under the law have been authoritatively determined, the litigation is not final when there are further related questions to be determined by a subordinate court. *Republic Natural Gas Co.* v. *Oklahoma*, *supra*, 334 U. S. at 70; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 143; 59 S. Ct. 754, 763; 83 L. Ed. 1147, 1159 (1939). The questions that may arise in the implementation of the general terms of the Order would involve more than a ministerial application of legal issues already decided. *Cf. Richfield Oil Corp.* v. *State Board*, 329 U. S. 69, 73; 67 S. Ct. 156, 158; 91 L. Ed. 80, 87 (1946). Since these complaints essentially concern equal treatment among the races, especially as shall be afforded the individual appellees, in the sale of publicly assisted housing, the relief that is to be afforded these parties cannot be considered a severed controversy. *Cf. Radio Station WOW* v. *Johnson*, 326 U. S. 120, 126; 65 S. Ct. 1475, 1479; 89 L. Ed. 2092, 2099 (1945).

Prior to the execution of a stipulation in this case, all parties had the right to a full hearing upon the sub-

stantive question of racial discrimination and upon the related issue of the particular relief that would be afforded, if any. The Division's determination of these issues was subject to appeal, N.J.S.A. 18:25-21, and modification by the reviewing court, if necessary. N.J.S.A. 18:25-23. Had such an appeal been taken, because of the form or content of the Division's order, there would have been ample staying powers in the New Jersey appellate courts to guard against any irreparable injury to the appellant. *Revised Rules of the Supreme Court of New Jersey*, 1:4-6, 7:2:4-3. The order requiring a contract for the sale of property was a voluntary one and the execution of this Order will not effectively abrogate any asserted federal right, destroying the appellant's rights if successful upon the federal questions. *Cf. Forgay* v. *Conrad*, 47 U. S. (6 How.) 201, 204; 12 L. Ed. 404, 405 (1848). The Consent Order will merely require non-discriminatory treatment to prospective purchasers at Levittown, for so long as the Law Against Discrimination is held and a contract of sale with the complainants constitutional an obligation Levitt freely assumed. The essential controversy concerns the obligation of Levitt and the rights of the complainants under the Law Against Discrimination, and the relationship of each is essentially tied to the other. Compare *Forgay* v. *Conrad*, *supra*; *Radio Station WOW* v. *Johnson*, *supra*, with *Washington ex rel. Grays Harbor Logging Co.* v. *Coats-Fordney Co.*, 243 U. S. 251, 37 S. Ct. 295; 61 L. Ed. 702 and cases cited therein. Levitt's only immediate obligation to the individual appellees is not a severable one from the entire controversy, but one it freely assumed prior to the termination of the entire case in order to avoid a full administrative hearing and resulting order.

Until the parties have determined the conditions, terms, financial arrangements and even the non-discriminatory selection of a house in Levittown, there remains a substan-

tial portion of the entire controversy subject to dispute. In case of dispute, the Division's function will call for expert judgment, and the action taken by the Division in supervising full compliance with the Consent Order will be more than a ministerial task. Appellant has not borne the burden of establishing the finality of this judgment, and as long as there remains doubt as to such finality, the appeal should be dismissed as premature. *Republic Natural Gas Co. v. Oklahoma, supra.*

POINT II

This appeal does not raise any substantial Federal question.

A. There is no conflict between the New Jersey Law Against Discrimination and federal policy.

We join in that portion of the Motion and brief of the individual appellees treating the constitutionality of the housing provisions of the New Jersey Law Against Discrimination in relation to the Supremacy Clause, Article VI, Clause 2, of the United States Constitution (Motion to Dismiss by individual appellees Point II, page 10). To avoid repetition we shall not set forth extensive argument concerning the line of authority represented by *Huron Portland Cement Co. v. Detroit*, 28 U. S. L. W. 4269, 4271 (April 25, 1960), and *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U. S. 740, 62 S. Ct. 820, 86 L. Ed. 1154 (1942). *See* also *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 65 S. Ct. 1515; 89 L. Ed. 1915 (1945); *Auto Workers v. Wisconsin Bd.*, 336 U. S. 245; 69 S. Ct. 516; 93 L. Ed. 651 (1949); *Reagan v. Mercantile Trust Co.*, 154 U. S. 413 14 S. Ct. 1060; 38 L. Ed. 1028 (1894). The Court has established clearly that it will not find a State statute repugnant to federal policy or Congressional fiat unless the latter is expressly stated.

For this reason we submit that appellant's argument is contrary to firmly established principle and reveals total lack of substance to the federal question raised. *Equitable Life Assurance Society v. Brown*, 187 U. S. 308; 23 S. Ct. 123; 47 L. Ed. 159.

The New Jersey Constitution, Art. I, Section 5, provides:

> "No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin."

Long before the provisions under review giving enforcement powers to the Division over racial discrimination in housing were enacted, the New Jersey courts declared unlawful racial discrimination in public housing. *Seawell v. MacKithen*, 2 N. J. Super. 255 (Ch. Div. 1949), *rev'd on other grds.*, 3 N. J. 563 (1949); *Taylor v. Leonard*, 30 N. J. Super. 116 (Ch. Div. 1954); *Racial Discrimination in Housing*, Note, 107 U. of P. Law Rev., 515, 517 (1959). The policy of prohibiting racial discrimination in public housing in New Jersey has been an important and long-standing one; the Court, in the *Taylor* case, stated:

> "The eventual survival of any form of government necessarily depends on the equal apportionment of the rights and privileges of citizenship as well as its obligation and duties among all its citizens irrespective of race, color or creed. Such a principle has long since been the keystone of our national and state form of government."

In enacting the Law Against Discrimination, the New Jersey Legislature utilized language similar to the court's as the basis for such legislation. N.J.S.A. 18:25-2, 3.

Federal policy in this regard has been no less consistent. Whenever a person receives the benefits of funds and assistance derived from all people there is strong public policy dictating that such benefits be available for the good of all persons without racial discrimination. See *Hayward v. P.H.A.*, 238 F. 2d 689, 696 (5 Cir. 1956); *Detroit Housing Commission* v. *Lewis*, 226 F. 2d 180 (6th Cir. 1955); *Askew v. Benton Harbor Housing Commission* (not officially reported), 2 Race Rel. L. Rep. 611 (D. C. Mich. 1956); *Davis v. St. Louis Housing Authority* (not officially reported), 1 Race Rel. L. Rep. 353 (D. C. Mo. 1955); *Jones v. City of Hamtramck*, 121 F. Supp. 123, 124 (D. C. Mich. 1954); *Lann v. Toledo Metropolitan Housing Authority*, 113 F. Supp. 210, 212 (D. C. Ohio 1953). This Court's recognition of the validity of anti-discrimination laws is in accord and reveals the lack of substance to any claim of a violation of Congressional policy or conflict with the Supremacy Clauses of the United States Constitution. See *Railway Mail Ass'n. v. Corsi*, 326 U. S. 88; 65 S. Ct. 1483; 89 L. Ed. 2072 (1945); *Hob-Lo Excursion Co. v. Michigan*, 333 U. S. 28; 68 S. Ct. 358; 92 L. Ed. 455 (1948). See also VI N. Y. Law Forum 38, Forster and Rabkin, *The Constitutionality of Laws Against Discrimination in Publicly Assisted Housing* (1960).

The case of *Johnson v. Levitt & Sons, Inc.*, 131 F. Supp. 114 (D. C. Pa. 1955) is not in conflict with state regulation of racial discrimination in federally assisted housing projects. The court considered the procedural question of a right of action against racial discrimination in public housing in federal court and stated:

> "The extent of the plaintiffs' rights and whether or not they are being violated by the defendants are questions not involved in this motion. The only question is whether the plaintiffs' action can be maintained in this court. Any remedy which they may have in the courts of Pennsylvania is not affected."

The appellant argues that there is a Congressional preemption in the National Housing Act of 1934, 12 U.S.C. §1701 *et seq.*, 48 Stat. 1246, discernible only by implication, concerning the subject of racial discrimination. Congressional silence in this area would thus be construed to conflict with the many regulations of the Federal Housing Administration against racial covenants in properties assisted by it. 24 C.F.R., §§231.16, 241.16, 243.19, 243.21, 243.29, 221.29, 221.34, 221.40, 203.19, 203.24 and 203.29. This same Congressional omission would apparently conflict with §601 of the National Housing Act, 28 U.S.C., §1750aa which provides:

> "It is declared to be the policy of Congress:"
>
> (a) to seek the constant improvement of the living conditions of all the people under a strong, free, competent economy, and to take such action as will facilitate the operation of that economy to provide adequate housing for all the people . . ."

This statement is perhaps the only expression of Congressional policy that has bearing on the subject; it does not purport to remove from the States their police power to enact laws concerning racial discrimination for the safety, health and morals of the people within their boundaries.

If the appellant's argument was logically valid, 28 U. S. C., §1703, concerning eligible financial institutions, would necessarily be construed to remove all state control from those institutions subject to F.H.A. assistance inasmuch

as and to the extent that the National Housing Act has prescribed minimum qualifications to act under the F.H.A. program. Beside the many necessary State laws designed to regulate these agencies coordinately with federal law, New Jersey has legislation against racial discrimination committed by these same financial institutions. N.J.S.A. 17:34-44, 45; N.J.S.A. 17:19A-69; N.J.S.A. 17:12A-78. Clearly, appellant's argument calls for incongruous results. Additionally, state courts have found a clear Congressional intent to allow local regulation in the absence of an express conflict with federal policy, even in areas dealt with by Congress. *Stuyvesant Town v. Lighaw*, 17 N. J. 473 (1955). *Northridge Coop. Sec. No. 1 v. 32nd Ave. Const. Corp.*, 2 N. Y. 2d 214, 141 N. E. 2d 802 (1957).

The appellant's argument concerning Congressional intent by omission is not supported by the cases cited. *American Bridge Co. v. Smith*, 352 Mo. 616, 179 S. W. 2d 12 (Sup. Ct. Mo. 1944), cert. den. 323 U. S. 712 (1944) concerns a state court's construction of an express state statute. *Western Union Tel. Co. v. Lenroot*, 323 U. S. 490, 65 S. Ct. 335, 89 L. Ed. 414 (1945) dealt with the proper interpretation of Congressional language actually included in the law after the act had been subject to numerous changes in the legislative process. *Dorsey v. Stuyvesant Town Corp.*, 299 N. Y. 512, 87 N. E. 2d, 541 (1949), cert. den. 339 U. S. 981 (1950) again only concerned a state court's construction of a state law, and the reasoning therein as related to the National Housing Act would imply that, since Congress has not acted in this field, it has left such regulation concerning racial discrimination to the states. The obvious difference with *Dorsey* and this situation is that failure of state legislation results in no regulation but a failure of federal legislation leaves open the area for otherwise valid State law.

Levitt's argument as to the effect of Congressional failure to approve suggested amendments to the National Housing Act prohibiting racial discrimination is without legal basis. The failure of Congressional adoption in this regard is more properly evidence of a Congressional intent to leave such regulation to the states than an implication that Congress intended to remove from the states the power to act in an area where the federal legislature has not acted. See II Emerson & Haber, *Political and Civil Rights in the United States*, 1238-1239, fn. 13. Such negative legislation as suggested by the appellant would impliedly remove from State police powers the right to act in any area where Congress has failed to act after legislation has been offered.

Resort to legislative history is properly invoked only when the statute in question is ambiguous. Examination of the entire National Housing Act of 1934, as amended, even in light of abortive attempts to amend this act to include prohibitions against racial discrimination, does not reveal any federal policy to restrict state action. Attempted amendments to the 1934 law in the years, 1953—1956, are no part of the legislative history of the entire act. *Labor Board* v. *Lion Oil Co.*, 352 U. S. 282, 291; 77 S. Ct. 330, 335; 1 L. Ed. 2d 331, 338 (1957). To require such a prohibition against state action "would produce incongruous results" and thus should be avoided. 352 U. S. 288. FHA has consistently interpreted the law that housing projects built pursuant to its program, are subject to local regulation and specifically has interpreted the National Housing Act as requiring observance of local anti-discrimination laws. (Jurisdictional Statement p. 7; FHA Form No. 2201-G). This Court declared in *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 378; 51 S. Ct. 144, 145; 75 L. Ed. 397, 399 (1931) that "contemporaneous construction by those charged with the administration of the act * * * are * * * entitled to respectful consideration, and will not

be overruled except for weighty reasons." The Court has also recognized that no inference should be drawn from incomplete and indecisive steps in the legislative process, since this would be engaging in "speculative unrealities". *Helvering* v. *Hallock*, 309 U. S. 106, 119-121; 60 S. Ct. 444, 451; 84 L. Ed. 604, 612 (1940). Therefore, the premise upon which the appellant bases its alleged federal questions is without support.

There is no attempt in the New Jersey law to regulate the United States or any federal agency. The law is directed solely against persons selling or operating publicly assisted housing accommodations within the State. The exercise of State's police power in this regard is similar to State regulation of any instrumentality doing business with or assisted by the federal government. *Reagan* v. *Mercantile Trust Co., supra; Davis* v. *Elmira Savings Bank*, 161 U. S. 275; 16 S. Ct. 502; 40 L. Ed. 700 (1896); *National Bank* v. *Commonwealth*, 76 U. S. (9 Wall) 353; 19 L. Ed 701 (1869); *Penn Dairies* v. *Milk Control Commission*, 318 U. S. 261; 63 S. Ct. 617; 87 L. Ed. 748 (1943).

We, therefore, respectfully submit that appellants have failed to show any Congressional policy in this field; that the local regulations in no way restricts or conflicts with the national housing program adopted by Congress, nor does the New Jersey law attempt to regulate or impose requirements upon a federal agency. Therefore, the question concerning the Supremacy Clause of the United States Constitution is not substantial and should be dismissed. *Palmer Oil Corp.* v. *Amerada Corp.*, 343 U. S. 390 72 S. Ct. 842; 76 L. Ed. 1022 (1952).

B. Appellant's argument that the Law Against Discrimination is vague and indefinite, contrary to the Fourteenth Amendment does not raise a substantial Federal question.

The Division joins in Point III of the Motion and brief of the individual appellees, (Motion to Dismiss by individual appellees pp. 16-20) and will rely upon the arguments presented therein. The Division also is in accord with Point I raised by the individual appellees in this Motion and brief, to the effect that Levitt's claim of "indefiniteness" has not been properly raised before the New Jersey Supreme Court nor has that court expressly ruled upon the issue. (Motion to Dismiss by individual appellees pp. 5 to 10). (See also Appendix G.)

It is well established that before a federal question will be considered by the United States Supreme Court, that question must have been properly raised, according to the state procedure, before the highest court of the state. *Radio Station WOW v. Johnson, supra; Herndon v. Georgia*, 295 U. S. 441, 443; 55 S. Ct. 794, 795; 79 L. Ed. 1530, 1532 (1935); *American Surety Co. v. Baldwin*, 287 U. S. 156, 162-164, 53 S. Ct. 98; 77 L. Ed. 231 (1932). The test invoked for consideration by this court is that any federal question must be considered and disposed of by the state's highest court in a manner that constituted more than just a bare denial of rehearing. *Consolidated Turnpike v. Norfolk*, 228 U. S. 326, 334; 33 S. Ct. 510, 513; 57 L. Ed. 857, 862 (1913).

As is well illustrated by the individual appellees in this brief, the interpretation of N.J.S.A. 18:25-1, 5(k) and 9d by the New Jersey Supreme Court is precisely the construction advocated by all appellees throughout the entire controversy, and the same that was declared by the Appellate Division earlier in the litigation (Jurisdictional Statement

pp. 32a to 33a). This construction of the statutory definition of what the term publicly assisted housing "shall include" was clearly foreseeable by reason of the earlier New Jersey decision interpreting the penal New Jersey Civil Rights Law, R.S. 10:1-1 *et seq.* which contains almost identical language. In *State* v. *Rosalia Realty Co.*, 1 N. J. Super. 94 (App. Div. 1948), *cert. den.* 1 N. J. 602 (1949), the court held a swimming pool within the definition of what a "place of public accommodation shall include" though not specifically enumerated therein. Such a broad interpretation upon a statutory definition utilizing the word "include" has received the approval of this Court. *American Surety Co. of New York* v. *Marotta*, 287 U. S. 513, 517; 53 S. Ct. 260, 261; 77 L. Ed. 466, 468 (1933).

Therefore we submit that the appellant's presentation of the "vagueness" attack upon the New Jersey Law Against Discrimination because of the Fourteenth Amendment of the United States Constitution in a petition for rehearing which was summarily denied without discussion does not qualify within the Supreme Court's jurisdiction over federal questions occasioned by "surprise" interpretations of state laws. *Herndon* v. *Georgia*, *supra*, 444; *Great Northern Ry.* v. *Sunburst Co.*, 287 U. S. 358, 366-367; 53 S. Ct. 145, 149; 77 L. Ed. 360, 367 (1932).

The Division raises a further objection to the appellant's right to present the "vagueness" argument against the housing provisions of the New Jersey Law Against Discrimination. N.J.S.A. 18:25-4, 5(k) and 9.1. The Supreme Court of New Jersey has unanimously found that Levitt's operation is clearly covered by the housing provisions of the New Jersey Law Against Discrimination (Jurisdictional Statement 13a). Therefore the New Jersey law does not possess any semblance of vagueness as to Levitt. That corporation seeks to rely upon a possible constitutional objection, if there be any, of others:

It has been an inviolate rule of this Court that it will not concern itself with abstract and hypothetical questions concerning possible constitutional violations against the rights of another. *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461; 65 S. Ct. 1384, 1390; 89 L. Ed. 1725, 1734 (1945); *Coleman v. Miller*, 307 U.S. 433, 446; 59 S. Ct. 930, 937; 83 L. Ed. 1385, 1394 (1939); *Tyler v. Judges of Court of Registration*, 179 U.S. 405, 406; 21 S. Ct. 139, 140; 45 L. Ed. 252, 253 (1900). Potential invasions of constitutional rights are not enough to warrant the court's exercise of jurisdiction on appeal. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 324; 56 S. Ct. 466, 482; 80 L. Ed. 688, 711 (1936); *Liverpool, New York & Philadelphia Steamship Co. v. Commissioners of Emigration*, 113 U.S. 33, 39; 5 S. Ct. 352, 355; 28 L. Ed. 899, 901 (1885). An important corollary to the rule requiring actual cases and controversies to warrant consideration by the United States Supreme Court is the prohibition against a party asserting violation of the constitutional rights of others. *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450; 65 S. Ct. 1384; 89 L. Ed. 1725 (1945); *Tyler v. Judges of Court of Registration*, 179 U.S. 405; 21 S. Ct. 139; 45 L. Ed. 252 (1900); *Liverpool, New York & Philadelphia Steamship Co. v. Commissioners of Emigration*, 113 U.S. 33; 5 S. Ct. 352; 28 L. Ed. 899 (1885); *Tyson and Brother v. Banton*, 273 U.S. 418; 47 S. Ct. 426; 71 L. Ed. 718 (1927); *Hatch v. Reardon*, 204 U.S. 152; 27 S. Ct. 188; 51 L. Ed. 415 (1907); *Yazoo and Mississippi Valley R.R. Co. v. Jackson Vinegar Co.*, 226 U.S. 217; 33 S. Ct. 40; 57 L. Ed. 193 (1912); *State v. Bergen County Traction Co.*, 132 N.J. Super. 172, 212-214 (Ch. Div. 1954), *aff'd*, 12 N.J. 468 (1953), *app. dism.* 346 U.S. 909 (1954). Since [illegible] has to be held to be clearly within the [illegible] case of the New Jersey Law Against Discrimination, N.J.S.A. 18:25-1, and presumably within the liberal definition of a publicly assisted housing accommodation, N.J.S.A. 18:25-5(k), [illegible] has no right to assert an objection of vagueness to cause others within the "outer limits" of the law might have their constitutional rights violated.

CONCLUSION

We respectfully submit that the decision of the New Jersey Supreme Court in the [illegible] proceeding is not a final judgment or decree terminating the entire State litigation. For this reason the appeal should be dismissed as premature.

The appellant has not raised a substantial Federal question either of a violation of the Supremacy Clause of the United States Constitution because of its suggested statutory construction or of statutory vagueness contrary to Due Process. The issue of vagueness was not properly presented before the State Courts hence was it ruled upon in the State litigation; in any event the appellant does not have the standing and right to assert this constitutional objection. For these reasons we respectfully submit that the appeal in this matter should be dismissed.

Respectfully submitted,

DAVID D. FURMAN,
Attorney General of New Jersey,
Attorney for Division Against Discrimination, Appellee.

On the Brief:

LEE A. HOLLEY,
Deputy Attorney General.

[APPENDICES FOLLOW]

APPENDIX A-1

ORDER OF APPELLATE DIVISION DISMISSING ACTION AND DISSOLVING ORDER TO SHOW CAUSE AND RESTRAINT

This matter coming on to be heard on February 6, 1959 and continued on February 16, 1959, in the presence of Samuel Wolfson, Esq. (Sidney S. Jaffe, Esq., of counsel, appearing), attorney for plaintiffs; David D. Furman, Esq., Attorney General (Thomas P. Cook, Esq., Deputy Attorney General, appearing), attorney for defendant, Division Against Discrimination; Kapelsohn, Lerner, Leuchter & Reitman, Esqs. (Sidney Reitman, Esq., appearing) and Emerson L. Darnell, Esq., attorneys for Willie R. James; Herbert H. Tate, Esq. and Jerome C. Eisenberg, Esq. (Herbert H. Tate, Esq., appearing), attorneys for Franklin Todd, on:

(1) the adjourned return day of an Order To Show Cause why, among other things, an injunctive order should not be issued herein enjoining and restraining the Division Against Discrimination from taking any action in connection with the amended complaint, now pending in the Division Against Discrimination wherein the individual defendants are the complainants and the plaintiffs herein are respondents, from proceeding within the hearing on said amended complaint, and for a stay of said proceedings until the disposition of this action;

(2) the separately filed but similar motions of all defendants, made on due notice to plaintiffs, for, among other things, an order dismissing the within action on the grounds: (a) that this Court has no jurisdiction over the subject matter thereof, such jurisdiction, if any, being vested in the Appellate Division, to be

exercised as provided in R.R. 4:88-8(b); and (b) that, in any event, the within action is not maintainable because plaintiffs have failed to exhaust their administrative remedies before the Commissioner of Education and the Division Against Discrimination under the Law Against Discrimination (R.S. 18:25-1 et seq.), as required by R.R. 4:88-14;

and it appearing to the Court, after having duly heard and considered the matter, including the briefs and arguments of counsel, that plaintiffs' complaint and action cannot be entertained or maintained in this court because: (1) this Court is without jurisdiction over the subject matter of the action, such jurisdiction, if any, being vested in the Appellate Division, to be exercised as provided in R.R. 4:88-8(b); and (2) because, in any event, plaintiffs have failed to exhaust their administrative remedies before the Commissioner of Education and the Division Against Discrimination under the Law Against Discrimination (R.S. 18:25-1 et seq.), as required by R.R. 4:88-14; and good cause appearing for the making of this order,

It is on this 16th day of February, 1959 ORDERED that the complaint and action in the above entitled cause be and the same are hereby dismissed;

It is further ORDERED that the order to show cause heretofore issued as aforesaid, and the restraint and stay therein imposed and continued from time to time pending the return of said show cause order, be and the same are hereby dissolved.

SCHALICK
J. S. C.

The form only of the within order is approved.

Sidney S. Jaffe, Esq. of counsel with Samuel Wolfson, Esq., attorney for plaintiffs

APPENDIX A-2

(Order of Appellate Division for Stay, etc.)

Plaintiffs-appellants having moved this Court for an order staying the performance and enforcement of the order appealed from heretofore entered on February 19, 1959, in the Law Division of the Superior Court and further proceedings in defendant-respondent, Division Against Discrimination in the State Department of Education wherein defendants-respondents, Willie R. James and Franklin D. Todd, are complainants and plaintiffs-appellants, Levitt and Sons, Incorporated and William J. Levitt, are respondents; and

The Court, on its own motion, having decided to consider the within appeal also as a request by plaintiffs-appellants for leave to appeal to this Court from the setting down for hearing by defendant-respondent, Division Against Discrimination in the State Department of Education, before it the matter of the amended complaints filed by said defendants-respondents, Willie R. James and Franklin D. Todd, in the proceedings aforesaid, with leave granted for such appeal, so that the merits of the complaint filed by these plaintiffs-appellants in the Law Division of the Superior Court may be determined by this Court in this appeal;

It is, on this 16th day of March, 1959, Ordered:

1. The performance and enforcement of the said order entered in the Law Division of the Superior Court and the proceedings before defendant-respondent, Division Against Discrimination in the State Department of Education, be and the same are hereby stayed pending a determination and disposition of this appeal.

2. Further depositions, if any, to be taken by any of the parties hereto, shall be completed by March 23, 1959.

3. The brief of plaintiffs-appellants, on the merits aforesaid, shall be served and filed with the clerk of this court by March 23, 1959.

4. The briefs of defendants-respondents, on the merits aforesaid, shall be served and filed with the clerk of this court by April 1, 1959.

5. Argument of this appeal is set down for April 6, 1959, at a place to be announced by the Court.

FOR THE COURT

HAROLD A. PRICE,
SJAD

I hereby consent to the form of the foregoing order.

JULIUS WILDSTEIN
Of counsel with Defendants-Respondents

APPENDIX B

To The Honorable Chief Justice and Associate Justices of The Supreme Court of New Jersey:

The defendant-respondent, Division Against Discrimination in the Department of Education of the State of New Jersey, seeks leave to stay this proceeding on appeal to this court and to permit the Division Against Discrimination to conduct hearings and make final determinations in the cases of *Yuther Gardner* v. *Green Fields Farm, Inc.*, H8-4R, *Franklin D. Todd* v. *Levitt and Sons, Incorporated*, H3-12R, and *Willie R. James* v. *Levitt and Sons, Incorporated*, H3-13R, presently pending before that agency upon the verified complaints of Yuther Gardner filed on December 3, 1957 and amended on September 23, 1958, Franklin D. Todd filed on June 30, 1958 and amended on October 20, 1958, and Willie R. James filed on July 9, 1958 and amended on October 20, 1958. Reasons in support of this motion are expressed in the brief annexed hereto.

DAVID D. FURMAN
Attorney General of New Jersey
By: DAVID M. SATZ, JR.
Deputy Attorney General

DATED: October 26, 1959

APPENDIX C

SUPREME COURT OF NEW JERSEY

DOCKET NO. 2983

LEVITT AND SONS, INC.,

Plaintiff-Appellant,

vs.

DIVISION AGAINST DISCRIMINATION, et al.,

Defendants-Respondents.

On MOTION TO PERMIT AGENCY PROCEEDINGS TO CONTINUE.

This matter having been duly presented to the Court, it is Ordered that part of the motion seeking leave to proceed with the hearings before the Division against Discrimination is granted. That portion of the motion which sought stay of the appeal is denied.

The brief of the appellant is to be filed by November 20th; briefs of the respondents by December 11th; reply brief, if any, by December 16th; the argument will be scheduled for December 21st.

Witness, the Honorable JOSEPH WEINTRAUB, Chief Justice, at Trenton, this second day of November, 1959.

JOHN H. GILDEA,
Clerk.

FILED
Nov. 2, 1959
JOHN H. GILDEA,
Clerk

APPENDIX D

SUPREME COURT OF NEW JERSEY
DOCKET NO. 2983

LEVITT AND SONS, INC.,

Plaintiff-Appellant,

vs.

DIVISION AGAINST DISCRIMINATION, et al.,

Defendants-Respondents.

The plaintiff-appellant having filed a notice of appeal to the Supreme Court of the United States, it is ORDERED that the Mandate of this Court be held for a period of 60 days.

WITNESS the Honorable JOSEPH WEINTRAUB, Chief Justice, at Trenton, this fifteenth day of February 1960.

JOHN H. GILDEA,
Clerk.

APPENDIX E

MOTION FOR ORDER FURTHER HOLDING MANDATE

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey:

Plaintiff-Appellant, Levitt and Sons, Incorporated, respectfully moves this Court for an order further holding the mandate of this Court until the United States Supreme Court finally disposes of this case on plaintiff-appellant's appeal to that Court. The grounds in support of this motion are set forth in the accompanying statement and supporting brief and the affidavit of Ira G. Goldman.

PITNEY, HARDIN & WARD,
By WILLIAM P. REISS,
Attorneys for Appellant,
Levitt and Sons, Incorporated.

Dated: April 8, 1960

APPENDIX F

SUPREME COURT OF NEW JERSEY

DOCKET NO. 2983

LEVITT AND SONS, INC.,

Plaintiff-Appellant,

vs.

DIVISION AGAINST DISCRIMINATION, et al.,

Defendants-Respondents.

ON MOTION TO HOLD MANDATE

This matter having been duly presented to the Court, it is Ordered that the mandate of this Court be held until June 30, 1960.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this eleventh day of April 1960.

JOHN H. GILDEA
Clerk

FILED
Apr. 11, 1960

JOHN H. GILDEA
Clerk

APPENDIX G

SUPREME COURT OF NEW JERSEY

No. M182 SEPTEMBER TERM 1959

LEVITT AND SONS, INC.,

Plaintiff-Appellant,

vs.

DIVISION AGAINST DISCRIMINATION, et al.,

Defendants-Respondents.

ON PETITION ORDER

This matter having been duly considered by the Court, it is ORDERED that the motion for leave to file a petition for rehearing out of time is granted.

No Justice who voted with the majority having moved a reconsideration the petition for rehearing is denied.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton this eighth day of April 1960.

JOHN H. GILDEA
Clerk

LE COPY

No. 865

Office-Supreme Court, U.S.
FILED
MAY 31 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

LEVITT AND SONS, INCORPORATED,

Appellant,

v.

DIVISION AGAINST DISCRIMINATION IN THE STATE DEPARTMENT OF EDUCATION, WILLIE R. JAMES AND FRANKLIN D. TODD,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

BRIEF OF APPELLANT OPPOSING APPELLEES' MOTIONS TO DISMISS.

WILLIAM P. REISS,
PITNEY, HARDIN & WARD,
500 Broad Street,
Newark 2, New Jersey,
Attorneys for Appellant.

CLYDE A. SZUCH,
On the Brief

May 31, 1960

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IN THE

Supreme Court of the United States

OCTOBER TERM 1959.

No. 865.

LEVITT AND SONS, INCORPORATED

Appellant,

v.

DIVISION AGAINST DISCRIMINATION IN THE STATE DEPARTMENT OF EDUCATION, WILLIE R. JAMES and FRANKLIN D. TODD,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

BRIEF OF APPELLANT OPPOSING APPELLEES' MOTIONS TO DISMISS.

POINT I.

The judgment of the Supreme Court of New Jersey appealed from is a reviewable final judgment.

The judgment of the New Jersey Supreme Court appealed from is a reviewable final judgment in a separate and independent state court proceeding in lieu of prerogative writ determining the jurisdiction of a state administrative agency and the constitutionality of the statute pursuant to which jurisdiction was sought to be exercised.

Because prerogative writ proceedings involving the extraordinary writs of mandamus, prohibition, quo war-

ranto and certiorari often involved wasteful litigation concerning the identity of the proper prerogative writ, cases having been dismissed on final appeal because the complainant had sought the wrong prerogative writ, and because of the discretionary character of prerogative writ proceedings [*Ward* v. *Keenan*, 3 N. J. 298, 303-5 (1949)], the 1947 Constitution of the State of New Jersey contained the following provision in Article VI, Section 5, Paragraph 4:

> "Prerogative writs are superseded and, in lieu thereof, review, hearing and relief shall be afforded in the Superior Court, on terms and in the manner provided by rules of the Supreme Court, as of right, except in criminal causes where such review shall be discretionary."

This constitutional provision was implemented by the New Jersey Supreme Court by the adoption of a rule, now R. R. 4:88-1 *et seq.*, establishing the procedure to be followed in proceedings in lieu of prerogative writs.

Although the various historic prerogative writs have been replaced in New Jersey by a single proceeding called "a proceeding in lieu of prerogative writ", the relief available is still determined by the substantive law of the historic prerogative writs. See *Ward* v. *Keenan*, *supra*, at 308; *Nolan* v. *Fitzpatrick*, 9 N. J. 477, 485 (1952).

This action was commenced as an action in lieu of prerogative writ under R. R. 4:88-2 in the Superior Court, Law Division. On appeal to the Superior Court, Appellate Division from the dismissal of the action in the Law Division, the Appellate Division decided to consider the appeal as an application for leave to review, under R. R. 4:88-8(b), the action of the Division setting down for hearing the complaints of the individual appellees. R. R. 4:88-8(b) is another section of the rule of the New Jersey Supreme

Court governing "Procedure In Lieu Of Prerogative Writs".

This Court has historically recognized the independent nature of state court prerogative writ proceedings and has consistently held that judgments of the highest state court in such proceedings are final judgments reviewable in this Court when they determine adversely to complainants the jurisdiction of a state administrative agency or an inferior court and the constitutional validity of the applicable statute. *Rescue Army* v. *Municipal Court of the City of Los Angeles*, 331 U. S. 549 (1947); *Bandini Petroleum Co.* v. *Superior Court*, 284 U. S. 8 (1931); *Missouri ex rel. St. Louis B. & M. R. Co.* v. *Taylor*, 266 U. S. 200 (1924); *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U. S. 30 (1916).

The state court proceedings in this case are strikingly similar to those reviewed by this Court in *Pacific Coast Dairy, Inc. v. Department of Agriculture*, 318 U. S. 285 (1943). In the *Pacific Coast* case, the Supreme Court of California denied an application for a writ of mandamus to prevent a state administrative agency from conducting a proceeding to revoke a milk distributor's license. This Court heard and decided that case on the merits without discussing the finality of the judgment below, although it had previously requested briefs and argument on the question of whether the judgment was final. Supreme Court Journal, October Term 1942, Page 8; 11 U. S. Law Week 3106, col. 2.

Even if this case be viewed as one not involving an independent litigation, nevertheless the judgment appealed from is final and reviewable because nothing more remains to be done except the ministerial act of entering in the Division the order stipulated by all of the parties to the litigation, including the Attorney General of New Jersey as attorney for the Division.

The statutory procedure under which the Division acts, as set forth in N. J. S. A. 18:25-1 *et seq.*, provides for a hearing, the filing of findings of fact on the basis of the evidence produced thereat and the entry of an order requiring a respondent to cease and desist from acts unlawful under the statute and to take such affirmative action "as, in the judgment of the commissioner, will effectuate the purpose of this act, and including a requirement for report of the manner of compliance." N. J. S. A. 18:25-17. Such an order may be enforced by the commissioner in a civil action in the county court to compel specific performance (N. J. S. A. 18:25-19) or may be appealed by a party aggrieved to the county court (N. J. S. A. 18:25-2).

During the pendency of Levitt's appeal in the New Jersey Supreme Court and pursuant to the order of the Supreme Court of New Jersey of November 2, 1959 (Division Motion to Dismiss, Appendix C), the parties entered into a stipulation in the Division waiving hearing and the stating of findings of fact and specifying the terms of an order to be entered in the Division in the event that the Supreme Court of New Jersey determined adversely to Levitt the issues involved in the pending appeal. Motion of Individual Appellees, Appendix pp. 1a-4a. The order provided for in the stipulation is the same as the form of order which the Division would have been entitled to enter under N. J. S. A. 18:25-17 and it constitutes final definitive action by the Division in the proceedings before it. The fact that a respondent might fail to comply with the provisions of such an order, thus warranting subsequent enforcement activities by the Division, does not affect the finality of the order in any respect.

The stipulated order is not comparable to the form of order in *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62 (1948), relied upon by the Division. The order in that

case provided for negotiation between the parties on various issues in the litigation and, upon failure of agreement in negotiations, for further administrative agency proceedings to result in an order determining such issues. There are no such comparable provisions in the stipulated order in this case and the possibility of subsequent enforcement proceedings does not detract from the finality of the order. *La Crosse Telephone Corp.* v. *Wisconsin Employment Relations Board*, 336 U. S. 18 (1949); *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125 (1939).

Because of the existence of the stipulation providing for the form of order to be entered in the administrative agency, this case is in the same posture of finality as many others which this Court has held to involve final judgments despite the fact that there yet remained to be done the ministerial act of entering judgment in a lower court on remand from the court whose judgment has been appealed. *Chicago* v. *Atchison, Topeka & Santa Fe R. Co.*, 357 U. S. 77 (1958); *Department of Banking* v. *Pink*, 317 U. S. 264 (1942); see *St. Louis, Iron Mountain and Southern R. Co.* v. *Southern Express Co.*, 108 U. S. 24 (1883).

The fact that the parties have waived hearing and findings of fact and have stipulated the form of order to be entered in the administrative agency with nothing more to be done in the state administrative agency than to enter the order makes this case identical in form to that involved in *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69 (1946), where the case had been tried on pleadings and stipulated facts with a jury having been waived.

POINT II.

The federal question set forth in Point II of the Jurisdictional Statement was timely raised in the court below.

As pointed out at pages 10 and 11 of the Jurisdictional Statement, the federal question discussed in Point II of the Jurisdictional Statement concerning the unconstitutionality of the New Jersey Law Against Discrimination under the due process clause of the Fourteenth Amendment arose in this case for the first time by virtue of the construction put on the statute by the Supreme Court of New Jersey in its opinion. The opinion eliminated the statutory definition in N. J. S. A. 18:25-5(k) of "publicly assisted housing accommodation" used in N. J. S. A. 18:25-4, thereby rendering the subject matter of the prohibition of N. J. S. A. 18:25-4 so vague and indefinite that, by applying the statutory prohibition to Levitt, the court deprived Levitt of its property without due process of law in violation of the Fourteenth Amendment.

To afford the Supreme Court of New Jersey an opportunity to reconsider its ruling in the light of this constitutional infirmity, Levitt, on March 28, 1960, moved for leave to file a petition for rehearing out of time. In its motion Levitt quoted Question 2 set forth in its Notice of Appeal to this Court and pointed out that the principles followed by this Court on review of judgments of the highest courts of the states required such presentation by way of petition for rehearing. In the petition for rehearing accompanying the motion, Levitt argued the unconstitutionality of the statute as construed by that court, urging that the construction which eliminated the definition rendered the term "publicly assisted housing accommodation" vague and indefinite. By order dated April 8, 1960, the Supreme Court

of New Jersey granted Levitt's motion for leave to file the petition for rehearing out of time but denied the petition because no justice who voted with the majority had moved a reconsideration. Division Motion to Dismiss, Appendix B.

The decisions of this Court hold that the raising of a federal question for the first time in a rejected petition for rehearing is timely where the question is created by an unexpected decision of the highest state court which the appellant had no prior opportunity to assert. *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358 (1932); *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673 (1930); *Missouri ex rel. Missouri Insurance Co.* v. *Gehner*, 281 U. S. 313 (1930); *Ohio ex rel. Bryant* v. *Akron Metropolitan Park District*, 281 U. S. 74 (1930).

The cases cited by appellees recognize this principle. Appellees have limited their attack to an argument that Levitt should have anticipated the decision of the New Jersey Supreme Court eliminating the definition of "publicly assisted housing accommodation" as set forth in N. J. S. A. 18:25-5(k). It is Levitt's position that the record in this case does not support appellees' argument and that the construction of the New Jersey Law Against Discrimination adopted by the New Jersey Supreme Court was not one urged by appellees nor was it the construction adopted by the intermediate appellate court.

The New Jersey Supreme Court held that the term "publicly assisted housing accommodation" as used in N. J. S. A. 18:25-4 was not limited in meaning to the definition set forth in N. J. S. A. 18:25-5(k) and that such definition set forth merely illustrations of the meaning of the phrase. It held that Levitt's housing came within the term as used in N. J. S. A. 18:25-4. Jurisdictional Statement, pp. 7a-18a. The court considered the possibility that a liberal interpretation of the word "financed" in N. J. S. A.

18:25-5(k) might include Levitt's housing but refused to place its decision on this ground. The court did not hold that a consideration of the provisions of N. J. S. A. 18:25-4 and 5(k) together, with the application of normal canons of construction of legislative language, gave a meaning to the term "publicly assisted housing accommodation" which would include Levitt's housing. The opinion of the New Jersey Supreme Court, fairly read, reveals that that court saw no need for the legislature's inclusion of Section 5(k) in the statute and in effect wrote that provision out of the statute in connection with any interpretation of "publicly assisted housing accommodation".

The opinion of the Appellate Division does not contain any indication of the reasoning followed by that court in reaching its conclusion which, with respect to the construction of the statute, is set forth in no more than two brief paragraphs. Jurisdictional Statement, pp. 32a-33a. The individual appellees have quoted the first paragraph at page 7 of their motion. The first sentence of the next paragraph clearly indicates that the court had not adopted a construction predicated solely upon an interpretation of the meaning of the phrase "publicly assisted housing accommodation" as set forth in N. J. S. A. 18:25-4. In this sentence, the court stated

> "We further hold that, as *N. J. S. A.* 18:25-4 and *N. J. S. A.* 18:25-5, *subd. k*, create and define the civil right involved, the Division is empowered by statute to 'enforce the laws of this State against discrimination in housing built with public funds or public assistance, *pursuant to any law.*' (Emphasis supplied) (*N. J. S. A.* 18:25-9.1)."

The argument of the Division in the Appellate Division was not that N. J. S. A. 18:25-4 covered Levitt's housing

without reference to the definition in N. J. S. A. 18:25-5(k) but that the *statute* covered all "publicly assisted housing".

The Division did not argue in its brief filed in the New Jersey Supreme Court that the phrase "publicly assisted housing accommodation" in N. J. S. A. 18:25-4 was applicable to Levitt's housing without reference to the definition in N. J. S. A. 18:25-5(k). Throughout its brief the Division consistently referred to the provisions of both N. J. S. A. 18:25-4 and 5(k). In Subsection A of its first point, which was devoted to the question of statutory construction, the Division argued that Levitt was the recipient of federal assistance and that such assistance brought it within the meaning of the term "publicly assisted housing accommodation" as used in the Law Against Discrimination. It referred to the provisions of both sections, arguing from *State* v. *Rosecliff Realty Co.*, 1 N. J. Super. 94 (App. Div. 1948), *cert. denied*, 1 N. J. 602 (1949), that the construction canon of *ejusdem generis* authorized the application of the statute to Levitt's housing and concluded this argument with the following statement:

> "We therefore submit that the statute is not open to construction. The plain and clear language means that 'all' public assistance of 'any' *associated* quality qualifies housing for coverage by the Law Against Discrimination." (Emphasis added.) (p. 22)

In Subsection B of this point, the Division argued that though Levitt's housing was not in fact financed by FHA insured mortgage loans, it should be so considered by the court and thus held to be within "the specific definition of N. J. S. A. 18:25-5(k)." (p. 22)

The individual appellees discussed the construction of the statute in Point IV of their brief and, like the Division, they subdivided their argument into one which urged that

Levitt as the beneficiary of federal assistance came within the meaning of the term "publicly assisted housing accommodation" as used in both N. J. S. A. 18:25-4 and 5(k) as well as one urging that Levitt's housing was in fact financed by federally insured mortgages.

The paragraph from their brief quoted in the middle of page 8 of their motion in this Court concluded with the following sentence:

> "We submit that plaintiffs' efforts to distort the natural meaning and intent of the term 'publicly assisted housing accommodation' in section 5k are contrary to the well settled canons of construction applicable to the case at bar enunciated by this Court." (p. 22)

They thereafter, at page 24, summarized the argument to be made in subsequent subsections of Point IV as follows:

> "Two separate propositions support placing the present proceedings in sections 4 and 5(k), each of which is stated in greater detail below: . . . ."

Levitt clearly understood that the arguments of both appellees supported a construction of "publicly assisted housing accommodation" as used in both N. J. S. A. 18:25-4 and 5(k) which would include Levitt's housing. The paragraph on page 23 of Levitt's brief from which the individual appellees, at page 9 of their motion, have extracted a portion of a sentence is as follows:

> "The Division's alternative argument is that plaintiffs' housing should be considered as included within the meaning of 'publicly assisted housing accommodation' as used in N. J. S. A. 18:25-4 and 5(k) because of plaintiffs' substantial connection with FHA in endeavoring to bring their housing within the regulations and requirements of FHA. In making

this argument the Division assumes that the legislative intent was to include all housing as to which there was any public assistance."

The statement in Levitt's brief quoted from page 24 was a reference to the Division's argument based upon *State* v. *Rosecliff Realty Co., supra.* Answering this argument, Levitt took the position that the term "publicly assisted housing accommodation" was a legislatively manufactured phrase and that the legislative definition thereof in N. J. S. A. 18:25-5(k) should be considered the absolute limit of meaning despite the use of the word "include" and that the canon of construction of *ejusdem generis* followed in *State* v. *Rosecliff Realty Co., supra,* should not be applied in this case.

The New Jersey Supreme Court adopted a broad construction of the New Jersey Law Against Discrimination which was one not urged by the appellees in this case. The court has not only ignored the legislative definition of the term but has effectively eliminated it from the statute for all practical purposes. This construction is not one which Levitt could reasonably have anticipated. Customary canons of statutory construction require a reading of all of the provisions of a statute in an effort to ascertain legislative intent. Argument to a court urging unconstitutionality of a statute on the assumption that certain provisions might be eliminated by a court in order to construe a statute more broadly would be profitless speculation. Litigants should not be required to anticipate that a court by construction will eliminate the definition section of a statute rather than attempt to accommodate the definition with the word defined.

The Division makes the further argument that Levitt has no standing to argue unconstitutionality of the New

Jersey Law Against Discrimination because of vagueness and indefiniteness in view of the fact that the New Jersey Supreme Court "has emphatically found that Levitt's operation is clearly covered". It suggests that Levitt is seeking to urge the constitutional objection of others.

It is obvious that, had the New Jersey Supreme Court held that Levitt's operations were not covered by the statute, Levitt would have no standing to litigate the construction of the statute on appeal. The holding that Levitt's housing is within the meaning of the term "publicly assisted housing accommodation", as used in N. J. S. A. 18:25-4, makes Levitt a person aggrieved. No amount of emphasis by a court so holding or statements to the effect that Levitt's housing is clearly covered deprives it of such standing to sue. This case is not like one in which a statute, after enumerating certain categories subject thereto, thereafter utilizes a general phrase to make it applicable to an indefinite group. In such a situation a person in one of the enumerated categories cannot urge the indefiniteness of the general phrase. Here, the New Jersey Supreme Court has not held that Levitt's housing is included in the categories in the definition of "publicly assisted housing accommodation" in N. J. S. A. 18:25-5(k) but has eliminated that definition from the statute, except for the purpose of illustration.

Acceptance of the Division's contention, that Levitt has no standing to urge this constitutional argument simply because it has been held by the court to be covered by the statute, would render the statute immune from constitutional attack by anyone.

Burstyn v. *Wilson*, 343 U. S. 495 (1952), demonstrates the absurdity of the position of the Division. In that case the distributor of a motion picture challenged the constitutional validity for inadequacy of standards of a state licensing statute denying a license to a motion picture found

to be "sacrilegious" by the licensing board. Having been denied a license because the local licensing board had held the motion picture sought to be licensed "sacrilegious" within the meaning of the statute, the distributor obtained review of this administrative agency action in the Appellate Division of the Supreme Court of New York on the ground, among others, that the term "sacrilegious" was so vague and indefinite as to offend due process. The adverse determination of the Appellate Division which was affirmed by the Court of Appeals of New York was appealed to this Court which took jurisdiction and reversed on the merits.

POINT III.

The question concerning the unconstitutionality of the Law Against Discrimination under Article VI, Clause 2 of the U. S. Constitution is a substantial federal question.

This Court's recent decision in *Huron Portland Cement Co. v. City of Detroit*, U. S. , 28 U. S. Law Week 4269 (April 25, 1960), is not authority for upholding the constitutional validity of the New Jersey Law Against Discrimination under the supremacy clause of the U. S. Constitution, Article VI, Clause 2. In that case, this Court held that a municipal smoke abatement ordinance could be validly applicable to vessels operating in interstate commerce pursuant to a federal license and subject to federal inspection statutes. There was in that case no conflict between the municipal police power regulation and federal safety regulations. It was held that the federal licensing of vessels did not exempt them from local regulation in the exercise of police power and that the interstate commerce nature of the vessels' operations did not preclude non-

discriminatory regulation which did not impose an undue burden on interstate commerce.

The instant case is not one involving non-conflicting concurrent federal and state regulation of a business enterprise which has no relationship with a federal program. In this case, the private enterprise sought to be regulated by the state has a relationship to the operation of a federal program instituted by Congress in the exercise of its constitutional power to provide for the general welfare. U. S. Constitution, Art. 1, §8.

The unconstitutionality of the New Jersey Law Against Discrimination is, on these facts, evident from that line of authority of which *Public Utilities Commission* v. *United States*, 355 U. S. 534 (1958), is the most recent decision of this Court. In *Public Utilities Commission* v. *United States*, as in this case, state regulation of a private enterprise affects a federal program because of the relationship between the private enterprise and the federal agency which is effectuating the Congressionally authorized program.

The interference with the federal program created by the application of the New Jersey Law Against Discrimination in this instance grows out of the conflict between the state regulation and repeated Congressional rejection of anti discrimination amendments to the National Housing Act of 1934.

In addition to conflicting with this Congressional policy, the New Jersey Law Against Discrimination seeks to regulate the activities of a federal agency which is already subject to the pervasive regulation imposed by the Fifth Amendment. A state may not legislatively regulate the operations of a federal agency by imposing obligations in an area already constitutionally regulated even though the state regulations may be identical.

Conclusion.

It is respectfully submitted that the appellees' Motions to Dismiss should be denied and that this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

WILLIAM P. REISS,
PITNEY, HARDIN & WARD,
500 Broad Street,
Newark 2, New Jersey

Attorneys for Appellant,
Levitt and Sons, Incorporated.

CLYDE A. SZUCH,
On the Brief.

May 31, 1960.